No. 90-1972-CFY
Status: GRANTED

Title: United States, Petitioner
v.
John H. Williams, Jr.

Docketed:
June 24, 1991

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Wohlgemuth,Joel L., Lang,James C.

Entry	Date	Note	Proceedings and Orders
1	Jun 24 1991	G	Petition for writ of certiorari filed.
3	Jul 5 1991		Order extending time to file response to petition until August 23, 1991.
4	Aug 22 1991		Brief of respondent John H. Williams, Jr. in opposition filed.
5	Aug 28 1991		DISTRIBUTED. September 30, 1991
6	Sep 13 1991	X	Reply brief of petitioner United States filed.
8	Oct 7 1991		REDISTRIBUTED. October 11, 1991
9	Oct 15 1991		Petition GRANTED.
			**********
10	Nov 13 1991		Record filed.
		*	Certified proceedings and briefs U.S.C.A.-Tenth Circuit and U.S.D.C., Okla. 1 BOX (SEALED AND IN CAMERA RECORD)
11	Nov 20 1991		SET FOR ARGUMENT WEDNESDAY, JANUARY 22, 1992. (2ND CASE)
13	Nov 29 1991		Brief of petitioner United States filed.
12	Dec 2 1991		Joint appendix filed.
14	Dec 5 1991		CIRCULATED.
15	Dec 23 1991	X	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
16	Dec 30 1991	X	Brief of respondent John Williams, Jr. filed.
17	Jan 10 1992	X	Reply brief of petitioner United States filed.
18	Jan 22 1992		Argued

90-1972

No.

Supreme Court, U.S.
FILED
JUN 24 1991
THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN R. WILLIAMS, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether an indictment may be dismissed because the government failed to present exculpatory evidence to the grand jury.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional provision involved	2
Statement	2
Reasons for granting the petition	7
Conclusion	17
Appendix A	1a
Appendix B	16a
Appendix C	19a
Appendix D	27a

TABLE OF AUTHORITIES

Cases:

Bank of Nova Scotia v. *United States*, 487 U.S. 250 (1988)	4, 5, 6
Branzburg v. *Hayes*, 408 U.S. 665 (1972)	12, 14
Butterworth v. *Smith*, 110 S. Ct. 1376 (1990)	14
Cheek v. *United States*, 111 S. Ct. 604 (1991)	16
Costello v. *United States*, 350 U.S. 359 (1956)	12
Hochman v. *Rafferty*, 831 F.2d 1199 (3d Cir. 1987), cert. denied, 485 U.S. 1022 (1988)	9
Lawn v. *United States*, 355 U.S. 339 (1958)	12
Mu'min v. *Virginia*, No. 90-5193 (May 30, 1991)	15
United States v. *Adamo*, 742 F.2d 927 (6th Cir. 1984)	8
United States v. *Calandra*, 414 U.S. 338 (1974)	12, 13, 15
United States v. *Casamento*, 887 F.2d 1141 (2d Cir. 1989), cert. denied, 493 U.S. 1081 (1990)	9
United States v. *Ciambrone*, 601 F.2d 616 (2d Cir. 1979)	9
United States v. *Dionisio*, 410 U.S. 1 (1973)	13
United States v. *Dorfman*, 532 F. Supp. 1118 (N.D. Ill. 1981)	10
United States v. *Flomenhoft*, 714 F.2d 708 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984)	9

Cases—Continued: Page

United States v. *Hawkins*, 765 F.2d 1482 (11th Cir. 1985), cert. denied, 474 U.S. 1103 (1986) 8
United States v. *Ismaili*, 828 F.2d 153 (3d Cir. 1987), cert. denied, 485 U.S. 935 (1988) 9
United States v. *Larrazolo*, 869 F.2d 1354 (9th Cir. 1989) 8
United States v. *LaTorre*, 922 F.2d 1 (1st Cir. 1990) 8
United States v. *McClintock*, 748 F.2d 1278 (9th Cir. 1984), cert. denied, 474 U.S. 1103 (1986) 8
United States v. *Page*, 808 F.2d 723 (10th Cir.), cert. denied, 482 U.S. 918 (1987) 3, 4, 5, 9, 10, 14
United States v. *R. Enterprises, Inc.*, 111 S. Ct. 722 (1991) 13
United States v. *Reid*, 911 F.2d 1456 (10th Cir. 1990), cert. denied, 111 S. Ct. 990 (1991) 11
United States v. *Rivera-Santigo*, 872 F.2d 1073 (1st Cir.), cert. denied, 492 U.S. 910 (1989) 8
United States v. *Udziela*, 671 F.2d 995 (7th Cir.), cert. denied, 457 U.S. 1135 (1982) 14
United States v. *Vincent*, 901 F.2d 97 (8th Cir. 1990) 8

Constitution, statute and rule:

U.S. Const.:
Amend. IV 12
Amend. V 2
18 U.S.C. 1014 3
Fed. R. Crim. P.:
Rule 6(a) 12
Rule 6(f) 12

Miscellaneous:

P. Diamond, *Federal Grand Jury Practice and Procedure* (1990) 11
2 W. LaFave & J. Israel, *Criminal Procedure* (Supp. 1990) 11
Note, *Grand Jury: A Prosecutor Need Not Present Exculpatory Evidence*, 38 Wash. & Lee L. Rev. 110 (1981) 14
United States Attorneys' Manual (1988) 15

In the Supreme Court of the United States

OCTOBER TERM, 1990

No.

UNITED STATES OF AMERICA, PETITIONER

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JOHN R. WILLIAMS, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 899 F.2d 898. The orders of the district court (App., *infra*, 16a-18a, 19a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1990. Petitions for rehearing were denied on April 22, 1991. App., *infra*, 27a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part:

> No person shall be held to answer for a * * * crime, unless on a presentment or indictment of a Grand Jury * * *.

STATEMENT

1. Between September 1984 and November 1985, respondent obtained loans and renewals of loans from several banks in Tulsa, Oklahoma. In applying for those loans, respondent provided the banks with two types of financial statements. One statement, called a "Market Value Balance Sheet," included a list of respondent's "current assets." In financial statements, current assets are generally understood to be cash or assets that can be converted to cash within one year. Respondent's list of current assets contained a group of "notes receivable"; included in the list were notes totalling between $5 million and $6 million reflecting loans that respondent had made to three venture capital companies. Although respondent's balance sheet did not disclose the fact, each of the venture companies was relatively new and had a negative net worth at the time the statements were submitted to the banks; the value of those notes was therefore questionable. App., *infra*, 2a.

The second financial document used by respondent was a "Statement of Projected Income and Expense." It listed as a source of income for respondent the interest that was payable on the venture capital notes described above. Because of the precarious financial condition of the venture companies, no interest could be paid on the notes apart from the funds generated from respondent's own loans to the companies. Respondent's financial statements, however, failed to indicate that the interest income did not derive from an independent outside source, but came from the funds that he himself had invested in the venture companies. App., *infra*, 2a-3a.

2. On May 4, 1988, a grand jury sitting in the United States District Court for the Northern District of Oklahoma returned a seven-count indictment against respondent. The indictment charged respondent with knowingly making false statements to federally insured banks for the purpose of influencing the banks to extend loans, in violation of 18 U.S.C. 1014. The allegedly false oral and written statements related to respondent's overvaluation of the notes receivable in his current assets, and the overvaluation of his interest income in his projected income statement. App., *infra*, 3a.

After receiving portions of the grand jury transcript in discovery, respondent moved to dismiss the indictment on the ground that the government had failed to present "substantial exculpatory evidence" to the grand jury as required by *United States* v. *Page*, 808 F.2d 723, 728 (10th Cir.), cert. denied, 482 U.S. 918 (1987). Respondent claimed that his ledgers, tax returns, and other financial records were in the government's possession, but had been withheld from the grand jury. Respondent's theory was that those documents were exculpatory because they revealed that he and his accountants had consistently treated the notes receivable and interest income in the same manner as they had been treated in the presentations to the banks. Respondent also asserted that the government had in its possession and should have presented to the grand jury a five-volume transcript of his deposition, given in a bankruptcy proceeding, in which he explained his methods of ac-

counting and financial reporting in a fashion that he claimed exonerated him. App., *infra*, 3a-4a.

The district court initially denied respondent's motion, concluding that "there has been no substantial exclusion of exculpatory evidence from the purview of the Grand Jury." App., *infra*, 17a. Although stating that certain "potentially" exculpatory evidence had not been presented to the grand jury, the court found that that information did not rise to the threshold set by *Page*, because a prosecutor is not obligated "to 'ferret out and present every bit of potentially exculpatory evidence.'" *Ibid.*, citing *Page*, 808 F.2d at 728.

On reconsideration, however, the court reversed itself and dismissed the indictment. The court stated that two categories of evidence in the government's possession constituted "substantial exculpatory evidence" that had been withheld from the grand jury: (1) the bankruptcy deposition, in which respondent explained his financial accounting methods, and (2) various financial statements, tax records, accounting ledgers, and other documents prepared by respondent and his accountants. App., *infra*, 23a. As the court saw it, that evidence was germane to respondent's "intent to make materially false statements upon which the banks would rely," and was "substantially exculpatory." *Id.* at 24a.

The court then applied this Court's decision in *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256 (1988), under which an indictment may be dismissed for prosecutorial misconduct only if "'the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." Examining the facts under the *Bank of Nova Scotia* test, the district court concluded that the withheld information "raises reasonable doubt about [respondent's] intent to defraud," such that the grand jury's decision to indict was "gravely suspect." App., *infra*, 26a. Accordingly, the court dismissed the indictment without prejudice. *Ibid.*

3. The court of appeals affirmed. Citing its decision in *Page*, the court declared that "a prosecutor has the duty to present substantial exculpatory evidence to the grand jury." App., *infra*, 5a. The court treated the district court's determination that the government had withheld exculpatory evidence as a finding of fact, and it concluded that the district court's ruling was not clearly erroneous. *Id.* at 4a-5a, 7a-11a.

As to the bankruptcy deposition, the court of appeals found that although respondent's explanations of his accounting methods "may seem irrelevant and self-serving under the government's theory of the case, the grand jury must receive any information that is relevant to any reasonable theory it may adopt." App., *infra*, 8a. In this case, the court stated, the grand jury could reasonably have accepted a different view of respondent's definition of "current assets" than that offered by the government; if it had, respondent's explanations of his accounting methods "would have been relevant" in tending to establish that he lacked an intent to defraud the banks. *Id.* at 8a-9a.

As to respondent's financial records, the court noted that respondent had consistently reported his income and expenses in the same way that he had presented them to the banks. The court also observed that the grand jury could have concluded that re-

spondent's financial statements put the banks on notice that respondent used an unconventional method to account for his current assets. App., *infra*, 9a-10a. In light of those factors, the court concluded that the withheld evidence was "consistent with the possible theory that [respondent] simply did not intend to mislead the banks." *Id.* at 11a. It therefore upheld the district court's characterization of the withheld information as exculpatory.[1] *Ibid.*

The court also upheld the district court's determination that the absence of this evidence rendered the indictment vulnerable to dismissal under the *Bank of Nova Scotia* standard. The court explained that "the purpose of the grand jury is to render an unbiased, independent, and informed decision based on all relevant evidence"; the "government's theory of the case is not critical." App., *infra*, 14a. Reasoning that "[t]he finding of intent to commit a criminal act is a determination the grand jury must make in deciding whether probable cause exists," the court sustained the district court's ruling that "the failure to present evidence relevant to the critical issue of intent rendered the indictment suspect," *ibid.*, and justified the dismissal of the indictment without prejudice, *id.* at 14a-15a.

[1] In addition to arguing that the withheld information was not exculpatory, the government contended that its witnesses had in fact put before the grand jury the substance of the information discussed by the court. The court of appeals declined to decide that issue, however, stating that "the government did not designate the grand jury transcript as a part of the record before us." App., *infra*, 11a. On rehearing, the government explained that the grand jury transcripts had in fact been designated as part of the record, and that it was only because of an error by the district court clerk that the transcripts had not been transmitted to the Tenth Circuit. The government urged the panel to reconsider its holding in light of the transcripts. Gov't C.A. Pet. for Rehearing at 4. The panel, however, denied rehearing. App., *infra*, 27a-28a. For purposes of this petition, we assume that the grand jury did not actually receive the information that the court of appeals found to be exculpatory in this case.

REASONS FOR GRANTING THE PETITION

The court of appeals held that an indictment may be dismissed when the government has in its possession, but fails to present to a grand jury, evidence that is deemed "exculpatory" because it is consistent with a possible theory of defense. That holding squarely conflicts with decisions of other courts of appeals, which have held that a prosecutor has no duty to present exculpatory evidence to the grand jury. It also conflicts with basic principles governing the function of a grand jury and threatens to cause practical problems for courts and prosecutors. In hindsight, defendants can easily identify some arguably exculpatory evidence that the prosecutor did not present to the grand jury. If the decision below is allowed to stand, courts will be required to adjudicate those highly factual issues before trial, and prosecutors will have to expand their grand jury presentations to avert possible avenues of challenge. The decision below therefore constitutes a substantial source of potential delay and disruption in the criminal process. Because the question whether a prosecutor has any duty to present exculpatory evidence to a grand jury is a recurring issue on which the circuits are divided, and because the correct resolution of that question is of importance to the criminal justice system, this Court's review is warranted.

1. The Tenth Circuit's holding that a prosecutor has a duty to disclose exculpatory evidence to a

grand jury conflicts with the holdings of at least five other circuits. The First, Sixth, Eighth, Ninth, and Eleventh Circuits have all ruled that a prosecutor has no obligation to present exculpatory evidence to a grand jury. See *United States* v. *Rivera-Santiago*, 872 F.2d 1073, 1087 (1st Cir.) (prosecutor is neither required "to disclose exculpatory evidence" to a grand jury, nor "to impeach the credibility of his own witnesses"), cert. denied, 492 U.S. 910 (1989); *United States* v. *LaTorre*, 922 F.2d 1, 7 (1st Cir. 1990) (same); *United States* v. *Adamo*, 742 F.2d 927, 937 (6th Cir. 1984) ("A federal prosecutor is not obligated to present exculpatory evidence to the grand jury."); *United States* v. *Vincent*, 901 F.2d 97, 99 (8th Cir. 1990) ("The government is 'normally not under a duty to disclose exculpatory evidence to the grand jury.'"); *United States* v. *Larrazolo*, 869 F.2d 1354, 1359 (9th Cir. 1989) ("Ninth Circuit precedent does not impose an affirmative duty on the prosecutor to present exculpatory evidence * * *. 'The prosecutor has no duty to present to the grand jury all matters bearing on the credibility of witnesses *or any exculpatory evidence*.'"); *United States* v. *McClintock*, 748 F.2d 1278, 1285 n.3 (9th Cir. 1984) ("We reject any argument that the indictment should be dismissed for failure of the prosecutor to present exculpatory material to the grand jury. The prosecutor has no such legal obligation."), cert. denied, 474 U.S. 822 (1985); *United States* v. *Hawkins*, 765 F.2d 1482, 1488 (11th Cir. 1985) ("The government is not obligated to present exculpatory evidence to a grand jury."), cert. denied, 474 U.S. 1103 (1986).[2]

[2] The Third Circuit has not reached a settled conclusion on the existence or extent of any duty to present exculpatory evidence. See *United States* v. *Ismaili*, 828 F.2d 153, 165 n.13 (3d Cir. 1987) (leaving the issue open), cert. denied, 485 U.S. 935 (1988); cf. *Hochman* v. *Rafferty*, 831 F.2d 1199, 1204 (3d Cir. 1987) (no due process violation to omit credibility evidence because it was not "clearly exculpatory"), cert. denied, 485 U.S. 1022 (1988).

In *United States* v. *Page*, the Tenth Circuit explicitly broke with that line of authority to join those circuits it perceived as imposing the duty on a prosecutor to disclose exculpatory evidence to the grand jury. *Page* began by stating that "[t]here are two views concerning the duty of a prosecutor to present exculpatory evidence to a grand jury." 808 F.2d at 727. While noting that several decisions have rejected such a duty, it read decisions from the Second[3] and Seventh[4] Circuits as "suggest[ing] that,

[3] *United States* v. *Ciambrone*, 601 F.2d 616, 622-623 (1979). In *Ciambrone*, the court stated that "where a prosecutor is aware of any substantial evidence negating guilt he should, in the interest of justice, make it known to the grand jury, at least where it might reasonably be expected to lead the jury not to indict." *Id.* at 623. Subsequent Second Circuit cases have echoed that view. See *United States* v. *Casamento*, 887 F.2d 1141, 1183 (1989) ("[A] prosecutor should present exculpatory evidence where such evidence is 'substantial' and 'where it might reasonably be expected to lead the jury not to indict.'"), cert. denied, 493 U.S. 1081 (1990). No Second Circuit decision, however, has reversed a conviction or dismissed an indictment based on the principle discussed in *Ciambrone*.

[4] *United States* v. *Flomenhoft*, 714 F.2d 708, 712 (1983), cert. denied, 465 U.S. 1068 (1984). In *Flomenhoft*, the court rejected a claim that the government had failed to present exculpatory evidence to the grand jury, but cited with apparent approval a district court's statement that "while prosecutors need not present to the grand jury all circumstances which might be considered exculpatory, they must present evidence which clearly negates the target's guilt." *Id.* at 712,

although a prosecutor need not present all conceivably exculpatory evidence to the grand jury, it must present evidence that clearly negates guilt." *Ibid.* The court then adopted the latter rule, holding that "when *substantial* exculpatory evidence is discovered in the course of an investigation, it must be revealed to the grand jury." *Id.* at 728. The court justified its rule by stating that it promotes "judicial economy," because "[i]f a fully informed grand jury cannot find probable cause to indict, there is little chance the prosecution could have proved guilt beyond a reasonable doubt to a fully informed petit jury." *Ibid.*

Although the court in *Page* qualified its holding by stating that a prosecutor need not "ferret out and present every bit of potentially exculpatory evidence," 808 F.2d at 728, the decision in this case demonstrates the reach of the *Page* principle and the extent of its departure from the rule in other circuits. Here, in applying *Page*, the Tenth Circuit concluded that "the grand jury must receive any information that is relevant to any reasonable theory it may adopt." App., *infra*, 8a. In light of that principle, the court concluded that certain financial records and a deposition transcript of respondent should have been submitted to the grand jury because they were "consistent with [a] possible theory" of defense regarding respondent's lack of fraudulent intent. *Id.* at 11a. That rule puts the daunting burden on a prosecutor to anticipate a defendant's possible trial defenses, discover whether any information in the prosecutor's possession is "consistent" with those

quoting *United States* v. *Dorfman*, 532 F. Supp. 1118, 1133 (N.D. Ill. 1981). No Seventh Circuit decision has reversed a conviction or dismissed an indictment based on the principle discussed in *Flomenhoft*.

defenses, and then consume whatever of the grand jury's time is necessary to present such "exculpatory" evidence.[5]

The burden is particularly acute in complex cases involving extensive documentary evidence. Any number of documents may contain some evidence or be subject to some interpretation that is consistent with a defendant's possible theory of defense, but it is often far from obvious how the documentary evidence supports that theory. The problem is exacerbated when, as is often the case, the evidence in dispute bears on the gray area of intent. In contrast to the decision below, no other court of appeals has imposed such a burdensome requirement on the prosecutor's relationship to the grand jury.[6]

2. The Tenth Circuit's requirement that a prosecutor must disclose known exculpatory evidence to

[5] Since the decision in this case, the Tenth Circuit has ruled that *Page* does not require that a prosecutor reveal the criminal history of a particular witness to the grand jury because that is "not evidence which would have negated [the] defendant's guilt." *United States* v. *Reid*, 911 F.2d 1456, 1460 (1990), cert. denied, 111 S. Ct. 990 (1991). Nothing in *Reid*, however, signals a retreat from the rule announced here and in *Page* that authorizes courts to review the record of the presentation before the grand jury to determine whether exculpatory evidence of some kind has been withheld from the grand jury.

[6] Commentators have recognized that the "federal courts [are] sharply divided" with respect to whether "the prosecutor's failure to present known exculpatory evidence will constitute sufficient grounds to dismiss an indictment." 2 W. LaFave & J. Israel, *Criminal Procedure* § 15.4, at 92 & n.78.1 (Supp. 1990) (citing cases illustrating the circuit split). See also P. Diamond, *Federal Grand Jury Practice and Procedure* § 9.04, at 346 (1990) (noting that "the circuits disagree on th[e] subject" of whether there is a duty to present exculpatory evidence).

the grand jury is unfounded. It is well established that an indictment may not be challenged on the ground that the evidence before the grand jury was inadequate or incompetent, *Costello* v. *United States*, 350 U.S. 359 (1956); was obtained in violation of the Fourth Amendment, *United States* v. *Calandra*, 414 U.S. 338 (1974); or was obtained in violation of the privilege against compulsory self-incrimination, *Lawn* v. *United States*, 355 U.S. 339 (1958). For several reasons, the principles that underlie those holdings cannot be squared with a rule that courts may dismiss indictments based on the prosecutor's failure to present exculpatory evidence to the grand jury. They are particularly incompatible with the Tenth Circuit's requirement that "the grand jury must receive any information that is relevant to any reasonable theory it may adopt." App., *infra*, 8a.

First, the grand jury's function is to determine whether probable cause exists; a grand jury proceeding is "not an adversary hearing in which the guilt or innocence of the accused is adjudicated." *Calandra*, 414 U.S. at 343; *Branzburg* v. *Hayes*, 408 U.S. 665, 686-687 (1972). The grand jury proceeds *ex parte*, has essentially investigative functions, and does not render final judgments. Potential targets do not have a right to appear before the grand jury, to cross-examine witnesses, or to present evidence in support of their theory of the case. And unlike the verdict of a petit jury, which must be the product of a unanimous finding of guilt beyond a reasonable doubt, an indictment may be returned if a bare majority of the grand jurors find probable cause. See Fed. R. Crim. P. 6(a) and (f). Because of the nature of the grand jury's functions, the grand jury cannot and need not explore all possible trial defenses, or even all substantial ones, before determining whether to indict. The time for adjudicating the defendant's defenses is at trial, in accordance with the constitutionally required safeguards that attend the trial process.

Second, it would greatly obstruct the grand jury's proceedings to permit judicial oversight of whether a prosecutor withheld exculpatory evidence. Not only would the litigation of such motions compromise grand jury secrecy in many cases, it also would require courts to hold "preliminary trials on the merits," *Calandra*, 414 U.S. at 350. "Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973); see also *United States* v. *R. Enterprises, Inc.*, 111 S.Ct. 722, 726-727 (1991).

Third, requiring courts to conduct pretrial proceedings to determine whether prosecutors had withheld exculpatory evidence from the grand jury would impose significant and unjustified costs on the criminal justice system. At the grand jury stage, it is often difficult for a prosecutor to predict whether a court will later view a particular item of evidence as "substantially exculpatory." Defenses have not been presented or fleshed out, and there is no formal adversary process to facilitate their development. Prosecutors would therefore be compelled, upon pain of dismissal of the indictment, to anticipate what evidence might be deemed, as the Tenth Circuit put it, "consistent with [a] possible theory" of defense that may surface later in the proceedings. App., *infra*, 11a. The inevitable result would be to pro-

long and complicate grand jury proceedings. And dismissing an indictment, so that the prosecutor would have to re-present the case by including evidence the court considered exculpatory, would impose additional costs and delays and inevitably provoke further dispute about the adequacy of the prosecutor's representation.[7]

The court of appeals ignored those costs in reasoning that its rule would "promote[] judicial economy"; the court surmised that if a fully informed grand jury could not find probable cause, then the petit jury would be unlikely to convict under the higher standard of proof that applies at trial. App., *infra*, 5a, quoting *Page*, 808 F.2d at 728. But that argument relies on a perception of judicial economy that is largely illusory. The prosecution has ample incentive not to seek an indictment when the chances of a conviction based on a full record are remote; "[f]or the most part, a prosecutor would be unlikely to request an indictment where a conviction could

[7] The grand jury is constituted as a body of independent citizens because of its "dual function of determining whether there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." *Branzburg* v. *Hayes*, 408 U.S. 665, 686 (1972); see *Butterworth* v. *Smith*, 110 S. Ct. 1376, 1380 (1990). But if courts routinely entertained attacks on omissions of possible defense evidence, it would quickly lead to a level of judicial scrutiny that would undermine the grand jury's independence, for, as one court has noted, "a court that dismisses a validly returned indictment is more guilty of interfering with the independence of the grand jury than a prosecutor who presents a slanted case to the grand jury." *United States* v. *Udziela*, 671 F.2d 995, 1001 n.3 (7th Cir. 1982) (quoting Note, *Grand Jury: A Prosecutor Need Not Present Exculpatory Evidence*, 38 Wash. & Lee L. Rev. 110, 117 (1981)), cert. denied, 457 U.S. 1135 (1982).

not be obtained." *Calandra*, 414 U.S. at 351. Because of the difficulty of assessing the exculpatory value of particular evidence at the grand jury stage, the process of judicial review of the presentations made to grand juries will be burdensome and will likely result in frequent errors. Even if the courts could correctly identify those few cases in which the withheld exculpatory evidence is so powerful that it would likely motivate a grand jury not to indict, it is certain that the courts would spend far more time reviewing meritless claims raised by creative defendants seeking to put the prosecutor on trial for conduct before the grand jury. Any benefits that would flow from that regime would come at far too high a cost.[8]

3. The court of appeals' decision has significant practical ramifications. If allowed to stand, the decision would have a substantial and troubling impact on criminal prosecutions in the Tenth Circuit. The decision below provides fertile grounds for defendants to create delay and distraction at the pretrial stage.

[8] This is not to say that prosecutors should not make fair and even-handed presentations to grand juries. The failure to do so is contrary to Department of Justice policy, which provides that

> when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person.

United States Attorneys' Manual ¶ 9-11.233, at 15 (1988). That a practice represents sound prosecution policy, however, does not mean that it is compelled by the Constitution, cf. *Mu'min* v. *Virginia*, No. 90-5193 (May 30, 1991), slip op. 9, or that its violation is a proper basis for dismissal of an indictment.

It also forces prosecutors needlessly to prolong their grand jury presentations; it imposes on courts the burden of sorting out whether particular items of evidence are sufficiently exculpatory; and it invites preliminary judicial proceedings that inevitably will compromise the integrity and secrecy of the grand jury process.

The rule will particularly impede white-collar criminal investigations, which frequently generate thousands of documents that could support a myriad of possible theories of defense. Those defenses emerge and crystallize long after the investigative phase of a case. A duty to present "exculpatory" evidence relevant to a "possible" theory of defense in that situation confronts the prosecutor with the dilemma of presenting all conceivable evidence that may support some hypothetical defense, or risking protracted pretrial litigation that will scrutinize the grand jury record and that could result in dismissal of the indictment.

This case well illustrates the mischief that is inherent in the court of appeals' rule. The indictment in this case charged fraud in respondent's use of false financial statements to obtain loans from banks. Respondent, of course, was not compelled to divulge his defense to the allegations prior to the issuance of the indictment. Yet the court of appeals concluded that particular financial documents and information not given to the grand jury could be read as giving rise to a reasonable doubt that respondent had fraudulent intent. It may well be that this evidence was "consistent with [a] possible defense"; after all, the range of evidence that can support defenses going to intent is quite wide. Cf. *Cheek* v. *United States*, 111 S. Ct. 604, 611 (1991). But the question whether

particular evidence of intent is exculpatory or not should be reserved for the finder of fact at trial; it is not an issue that should be decided by a court as a matter of law, and certainly not on the necessarily incomplete record that typically accompanies a pretrial proceeding.

Under the court of appeals' ruling in this case, prosecutors must guess what defenses might be raised and must find all evidence in their files that is consistent with those defenses. Otherwise, a district court may later decide that the prosecutor failed to ensure that the grand jury "receive[d] any information that is relevant to any reasonable theory it may adopt." App., *infra*, 8a. Because of the widespread and harmful consequences that such a rule would impose on the administration of criminal justice and because of the division in the circuits on the validity of such a rule, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

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JUNE 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 88-2827, 88-2843

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT-CROSS-APPELLEE

v.

JOHN H. WILLIAMS, JR.,
DEFENDANT-APPELLEE-CROSS-APPELLANT

March 20, 1990

Before McKAY, SEYMOUR, and MOORE, Circuit Judges.

McKAY, Circuit Judge.

In this case, the trial court dismissed, without prejudice, a seven count bank fraud indictment after concluding that the government wrongfully withheld from the grand jury information that was substantially exculpatory. The court held that the government's failure to disclose the exculpatory evidence rendered the grand jury's decision to indict "gravely suspect." The government appeals.

I. FACTS

Defendant John H. Williams, Jr. is a businessman in Tulsa, Oklahoma. Between September 1984 and November 1985 defendant obtained loans and loan renewals from several banks in Tulsa. With each loan or renewal request, defendant presented the banks with two types of financial statements. The first type of financial statement, referred to as a "Market Value Balance Sheet," contained a category of assets called "Current Assets." The label "current assets" is a term commonly used to describe assets that will be realized in cash within one year, such as a receivable whose due date falls within the next twelve months. At the center of this case is a series of "Notes Receivable" that defendant listed under the "Current Assets" section of his "Market Value Balance Sheet." The "Notes Receivable" included notes amounting to between $5 million and $6 million receivable by defendant from several companies in which defendant had invested. Each of the companies was a relatively new venture with negative net worth. Thus, the government claimed that the classification of the notes as "current assets" was misleading because the poor financial condition of the debtor companies rendered the notes uncollectible in the short term.

The other type of financial disclosure at issue was contained in defendant's "Statement of Projected Income and Expense." One source of income listed on this statement was interest income payable on the notes receivable discussed above. The government alleged that due to the poor financial condition of the debtor companies, any interest accruing on the notes could only be paid to defendant with money loaned to the companies by defendant himself. Thus, according to the government, the disclosure of interest income was misleading because banks were likely to believe that the interest was a source of outside income to defendant.

After a six-month investigation, defendant was indicted for defrauding a bank in violation of 18 U.S.C. § 1014 (1982). The indictment charged defendant with seven counts of alleged material false statements and the willful overvaluation of notes, assets, and interest income. Defendant then filed a motion to compel the government to disclose any evidence that tended to exculpate defendant. In response, the government indicated it would comply with its continuing duty under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by providing any exculpatory evidence. At the hearing on defendant's motion, defendant claimed there was a discovery dispute because the government had not provided any *Brady* material. The government, after being ordered to provide any exculpatory material, agreed to provide defendant with edited portions of the grand jury transcript and to submit the unedited transcript to the court.

After reviewing the grand jury transcript, defendant filed a motion to dismiss the indictment, claiming that the grand jury's decision to indict was suspect because "the Government failed to present substantial exculpatory evidence to the Grand Jury." Record, vol. 1, Doc. 46. The evidence on which defendant based his argument consisted of defendant's ledgers, tax returns, and financial statements, all of which tended to show that defendant had consistently accounted for the notes receivable and interest the same way he presented them to the banks. In addition to the financial records, defendant claimed that the government had in its possession, but failed to produce,

a five-volume deposition given by defendant in an earlier bankruptcy proceeding. According to defendant, the deposition testimony contained explanations of defendant's methods of accounting and financial reporting that would have exonerated him. After a hearing, the district court denied defendant's motion.

Subsequently, a hearing was held on several pretrial motions, at which time defendant entered a motion to reconsider the earlier motion to dismiss the indictment. On reconsideration, the court found that the government had possessed substantially exculpatory information that was not presented to the grand jury. The court stated that the evidence "raises reasonable doubt about the defendant's intent to defraud," because it "indicate[s] a lawful basis for the information provided to the banks." Record, vol. 1, Doc. 85, Order, November 7, 1988, at 8. The court held that the absence of this evidence rendered the grand jury's indictment "gravely suspect" and dismissed the indictment without prejudice. *Id.* at 8-9.

The government appeals from the district court's finding that the government withheld substantially exculpatory evidence from the grand jury. In the alternative, the government argues that the remedy of dismissal was inappropriate. Defendant agrees with the district court's dismissal, but claims that the indictment should have been dismissed with prejudice.

II. DISCUSSION

A. Exculpatory Evidence

The district court's finding that the government withheld exculpatory evidence is a finding of fact. "Questions of fact are reviewed under the deferential, 'clearly erroneous' standard as set forth in Fed.

R.Civ.P. 52(a). Although the standard is a rule of civil procedure, it is applied to certain issues in criminal proceedings." *United States v. Ortiz*, 804 F.2d 1161, 1164 n. 2 (10th Cir.1986).

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Lone Star Steel Co. v. United Mine Workers, 851 F.2d 1239, 1242 (10th Cir. 1988).

We have previously held that a prosecutor has the duty to present substantial exculpatory evidence to the grand jury. *See United States v. Page*, 808 F.2d 723, 728 (10th Cir.1987). Although we do not require the prosecutor to "ferret out and present every bit of potentially exculpatory evidence," *id.*, we do require that substantial exculpatory evidence discovered during the course of an investigation be revealed to the grand jury. *Id.* Other courts have also recognized that such a duty exists. *See, e.g., United States v. Flomenhoft*, 714 F.2d 708, 712 (7th Cir. 1983), *cert. denied*, 465 U.S. 1068, 104 S.Ct. 1420, 79 L.Ed.2d 745 (1984); *United States v. Ciambrone*, 601 F.2d 616, 622-23 (2d Cir.1979); *United States v. Phillips Petroleum Co.*, 435 F.Supp. 610, 620 (N.D.Okla.1977). This requirement promotes judicial economy because "[i]f a fully informed grand jury cannot find probable cause to indict, there is little chance the prosecution could have proved guilt beyond a reasonable doubt to a fully informed petit jury." *Page*, 808 F.2d at 728.

The indictment contains seven counts alleging bank fraud against the defendant under 18 U.S.C. § 1014 (1988). Section 1014 makes it a crime for someone knowingly to make a false statement concerning a material fact to a financial institution for the purpose of influencing the financial institution's action. The substance of the indictment alleges that defendant knowingly overvalued his current assets to obtain approval and renewals of various loans. Although count two involves oral representations, all of the offenses charged allege that overvaluations were made by the defendant in his financial statements, income statements, or projected income statements. The overvaluations alleged by the government concern the value and/or classification of income (including interest income), collateral, and notes receivable.

One essential element of the offense for which defendant was indicted is the intent to influence the bank's action by the use of a false statement. *See United States v. Smith*, 838 F.2d 436, 439-40 (10th Cir.1988); *United States v. Bonnette*, 663 F.2d 495, 497 (4th Cir. 1981), *cert. denied*, 455 U.S. 851, 102 S.Ct. 1456, 71 L.Ed.2d 666 (1982). Although we recognize the burden of proof for conviction at trial is greater than the finding of probable cause by the grand jury, the presentation of the government's case to the grand jury must be based upon the essential elements of the offense.

The government argued below and on appeal that "under its theory" of the case, it presented all relevant evidence. The government claims that because the tax returns, general ledgers and depositions were not relevant, they cannot be considered exculpatory. The district court found that this evidence was substantially exculpatory because it supported a lawful basis for the information provided as opposed to the intent to defraud. In so doing, the district court separated the withheld evidence into two categories as follows:

> (1) written material generated in the bankruptcy proceedings involving defendant and his wife. This material included defendant's deposition in bankruptcy adversary proceedings in which he explains his balance sheet, income statement, the method of their preparation, and his beliefs regarding asset values assigned, as well as a discussion by the defendant of his venture capital investments and statements to bankers regarding those investments; and (2) financial statements, tax records, and general records of the Defendant prepared by Defendant and his accounting firm over a period of years.

Record, vol. 1, Doc. 85, Order, November 7, 1988, at 5-6. We now discuss the district court's findings with respect to each category.

1. *Bankruptcy Materials*

The government subpoenaed certain written materials generated in an adversary bankruptcy proceeding, including a deposition of defendant. Defendant claimed that the deposition contained exculpatory material and that it should have been presented to the grand jury. Further, because the government submitted a proposed designation of certain testimony from the deposition for use at trial, defendant argues that the government conceded that the deposition was relevant. The government argued, however, that the deposition testimony was self-serving and irrelevant, and therefore it could not be considered substantially exculpatory.

After reviewing the material generated in the bankruptcy proceedings the District Court stated:

> An examination of Defendant's deposition and the exhibits to the deposition reveals substantial exculpatory material. The Defendant explains his balance sheets and income statements in detail, the method of their preparation, and his beliefs with regard to the asset values assigned. The deposition also contains significant discussion by Defendant of his venture capital investments and statements made to banks regarding those investments. Without the benefit of Defendant's testimony before the grand jury this written material would be highly useful to the grand jury in evaluating Defendant's intent.

Record, vol. 1, Doc. 85, Order, November 7, 1988, at 85. In holding the bankruptcy deposition should have been presented to the grand jury, the court recognized a distinction between "calling a target of a grand jury investigation," which often results in self-serving statements, and "presenting sworn testimony on the issues presented to the grand jury when that sworn testimony is available." Record, vol. 6, at 4. In our review of defendant's deposition we found explanations regarding the accounting methods used to prepare the financial statements. Although these explanations may seem irrelevant and self-serving under the government's theory of the case, the grand jury must receive any information that is relevant to any reasonable theory it may adopt. For example, it would have been reasonable in this case for the grand jury to adopt a theory under which defendant contemplated a different definition of "current assets" than the government. Under such a theory, defendant's explanations would have been relevant in

that they would tend to show that defendant did not intend to influence the bank's actions. We conclude, therefore, that the district court was not clearly in error when it found that the deposition testimony was exculpatory.

2. *Financial Records*

The government subpoenaed the general ledgers and tax records covering the years 1984 and 1985 from defendant's accounting firm. While urging the court to reconsider the motion to dismiss, defendant argued that the general ledgers "prove up item by item the statement of income/expense just like the tax returns did," therefore the consistency in reporting his financial condition negated the defendant's intent to defraud. Record, vol. 5, at 138. Defendant contended, therefore, that the general ledgers were exculpatory evidence and that the government's withholding of these documents affected the grand jury's decision to indict. *Id.*

After reviewing the general ledgers, tax records and financial statements the district court stated:

> The statements as to income and expenses on the financial statements at issue in the indictment were drawn from these ledgers, which were also used to prepare Defendant's tax returns. This written material reveals a consistent format of reporting over a period of years and consistency in the figures reported from form to form. If the government had presented to the grand jury this information within its possession, the grand jury would have been aware that the Defendant's inclusion of interest income on the financial statements at issue were consistent with the general ledgers maintained by [the accounting firm]

> with Defendant's federal income tax returns and with Defendant's bank statements. Likewise, the grand jury would have been aware that the Defendant, with the assistance of [the accounting firm], presented figures as to note balances which comprise the notes receivable portion of the financial statements that was consistent with the face value of the notes of the general ledgers.

Record, vol. 1, Doc. 85, Order, November 7, 1988, at 7-8. We have examined the financial statements that formed the basis of the indictment. These financial statements contain a legend at the bottom of the first page of each particular document. The legend is noted by an asterisk that reads: "Marketable securities and certain investments have been adjusted to reflect fair market on (date of statement). All other assets are reflected at cost or other tax basis." Record, vol. 2, at Exhibits A, B, and C. The particular current assets that the government alleges were knowingly overvalued did not contain the asterisk legend. Therefore, the reader of the financial statements would be aware that the value for income, collateral, and notes receivable were at cost or other tax basis. In addition, the legend put the banks on notice that defendant's financial statements were not prepared in accordance with Generally Accepted Accounting Principles. Thus, a grand jury could reasonably conclude that: (1) defendant understood a different meaning of "current assets" than the government or the banks; and (2) because of the different meanings of "current assets" contemplated by the parties, defendant likely did not intend to mislead the banks.

The district court had the benefit of reviewing the grand jury transcript and all of the evidence in the

possession of the government. Our review has been limited to the designated record which contains various pleadings, transcripts of hearings before the district court, and the defendant's deposition taken in the bankruptcy proceedings. The government claims that all relevant portions of this evidence were presented to the grand jury through the testimony of witnesses. In its brief, the government requests "this Court to review the grand jury transcripts . . . and satisfy itself of the accuracy of the government's position." Government's Response, April 5, 1989, at 9. However, the government did not designate the grand jury transcript as a part of the record before us. If we had the benefit of reviewing the grand jury transcript, our review of the deposition's exculpatory evidence may have lead to a different conclusion. Nevertheless, we conclude that the explanations regarding the classification of the notes as well as their valuation in the financial statements are consistent with the possible theory that defendants simply did not intend to mislead the banks. We cannot say that the district court's finding that the deposition contained exculpatory evidence was clearly erroneous.

B. Indictment

Having concluded that the government withheld substantial exculpatory material from the grand jury, we must now consider (1) whether the district court was correct in finding that defendant was prejudiced, and (2) whether the district court abused its discretion by dismissing the indictment.

1. *Prejudice to Defendant*

The purposes of the grand jury require it to be both independent and informed in order to render a

decision free from bias. *See Wood v. Georgia*, 370 U.S. 375, 390, 82 S.Ct. 1364, 1373, 8 L.Ed.2d 569 (1962). The grand jury serves to "clear the innocent, no less than to bring to trial those who may be guilty." *United States v. Dionisio*, 410 U.S. 1, 16-17, 93 S.Ct. 764, 773, 35 L.Ed.2d 67 (1973) (footnote omitted). The grand jury also acts as "a protector of citizens against arbitrary and oppressive governmental action." *United States v. Calandra*, 414 U.S. 338, 343, 94 S.Ct. 613, 617, 38 L.Ed.2d 561 (1974). "To be independent and informed, the grand jury must be able to obtain all relevant evidence, since only then can its judgment truly be informed." *United States v. Flomenhoft*, 714 F.2d 708, 711 (7th Cir.1983), *cert. denied*, 465 U.S. 1068, 104 S.Ct. 1420, 79 L.Ed.2d 745 (1984) (citations omitted).

Applying the above-quoted principles, we have held than an indictment can be dismissed only when prosecutorial misconduct results in "some significant infringement on the grand jury's ability to exercise independent judgment." *United States v. Pino*, 708 F.2d 523, 530 (10th Cir.1983). The Supreme Court recently held that "a District Court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 108 S.Ct. 2369, 2373, 101 L.Ed.2d 228 (1988). In *Nova Scotia*, the court announced the following standard that court should apply whenever dismissal is sought for a nonconstitutional error.

> The prejudicial inquiry must focus on whether any violations had an effect on the grand jury's decision to indict. If violations did substantially influence this decision, or if there is grave doubt that the decision to indict was free from such substantial influence, the violations cannot be deemed harmless.

Id. 108 S.Ct. at 2378. This standard was first articulated in *United States v. Mechanik*, 475 U.S. 66, 78, 106 S.Ct. 938, 945-46, 89 L.Ed.2d 50 (1986) (O'Connor, J., concurring), and was based on the decisions in *United States v. Lane*, 474 U.S. 438, 449, 106 S.Ct. 725, 732, 88 L.Ed.2d 814 (1986), and *Kotteakos v. United States*, 328 U.S. 750, 765, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557 (1946). Although some errors or violations can be remedied at trial,[1] "where an unremedied violation is proved, the trial judge must still be satisfied that the violation resulted in grand jury intimidation or improper influence . . . and thus had a 'substantial influence' on the indictment returned, or that there is grave doubt as to whether it had such effect." *Mechanik*, 475 U.S. at 78, 106 S.Ct. at 946 (*citing Kotteakos*, 328 U.S. at 765, 66 S.Ct. 1248).

In the present case, the district court reviewed all the disputed evidence and concluded that the deposition, tax records, general ledgers and financial statements revealed a consistent format of reporting that "indicate[s] a lawful basis for the information Defendant provided to the banks, as opposed to any indication of intent to defraud those banks." Record, vol. 1, Doc. 85, Order, November 7, 1988, at 8. The government argues that the withheld evidence was adequately discussed before the grand jury and that

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[1] Earlier cases have held that some errors can be remedied at trial, and do not warrant a dismissal. *See, e.g., United States v. Page*, 808 F.2d 723, 727 (10th Cir. 1987); *Talamante v. Romero*, 620 F.2d 784, 790-91 (10th Cir. 1980), *cert. denied*, 449 U.S. 877, 101 S.Ct. 223, 66 L.Ed.2d 99 (1980) (perjured testimony before grand jury).

providing the material would have been a fruitless gesture. Further, the government argues that the grand jury "would not have known or understood the relevance of [the documents] without knowing the theory of the case." Government's Response, April 5, 1989, at 8. As we have already noted, the purpose of the grand jury is to render an unbiased, independent, and informed decision based on all relevant evidence. Consequently, the government's theory of the case is not critical. The finding of intent to commit a criminal act is a determination the grand jury must make in deciding whether probable cause exists. Here, the district court found that the failure to present evidence relevant to the critical issue of intent rendered the indictment suspect. We cannot say, based on our review of the record, that this finding was clearly erroneous.

2. *Dismissal Without Prejudice*

As a final matter, we must examine the propriety of the district court's dismissal of the indictment without prejudice. Our standard of review is to determine whether the district court abused its discretion. *See United States v. Strayer*, 846 F.2d 1262, 1265 (10th Cir.1988); *United States v. Derr*, 726 F.2d 617, 619 (10th Cir.1984). Based on the above review of the district court's findings, we conclude that the court did not abuse its discretion in granting defendant's motion to dismiss the indictment. Further, despite defendant's request for dismissal with prejudice, we hold that the district court was correct in dismissing the indictment without prejudice "so that the government can, . . . again, if it elects, present the matter to the grand jury for determination of probable cause." Record, vol. 6, at 5. The more

drastic remedy of dismissal with prejudice would not be justified under these circumstances.

III. CONCLUSION

After reviewing the record, we hold that the district court was not clearly erroneous when it found that the government withheld substantial exculpatory material from the grand jury. Based on this error by the government, the district court correctly found that the absence of the withheld evidence prejudiced defendant before the grand jury rendering the grand jury's indictment suspect. Consequently, the district court did not abuse its discretion when it granted defendant's motion to dismiss the indictment. Finally, we hold that under the circumstances, the district court properly dismissed the indictment without prejudice.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA

Case No. 88-CR-52-E

UNITED STATES OF AMERICA, PLAINTIFFS

vs.

JOHN H. WILLIAMS, JR., DEFENDANTS

ORDER

[Filed Oct. 14, 1988]

Now on this 14th day of October, 1988, this matter comes on for consideration by this Honorable Court and the Court, being fully advised in the premises finds that on October 3, 1988, Defendant John H. Williams moved to dismiss the indictment on the grounds that the prosecutor failed to disclose exculpatory evidence to the Grand Jury. The government filed its response on October 6, 1988, to which the Defendant replied on October 12, 1988.

This Court has carefully reviewed all the supporting documentation filed by Defendant in his appendices which contained, *inter alia*, Defendant's deposition taken in a bankruptcy adversary proceeding and several documents which the government delivered in connection with its responsibilities under *Brady v. Maryland*, 373 U.S. 83 (1963). In addition, this

Court has similarly carefully reviewed the unedited transcripts of testimony taken before the Grand Jury prior to indictment.

The Court has examined the pertinent authorities in this area, most notably *United States v. Page*, 808 F.2d 723 (10th Cir. 1987), *cert. denied*, 107 S.Ct. 3195 (1987) and *United States v. Kilpatrick*, 821 F.2d 1456 (10th Cir. 1987). Applying the standards delineated therein, the Court finds that there has been no substantial exclusion of exculpatory evidence from the purview of the Grand Jury. Granted, individual items of potentially exclusionary evidence such as Defendant's tax returns and opinions of the Defendant's friends and business associates regarding his business judgment as related to the issue of intent were not presented to the Grand Jury but the *Page* standard does not oblige the prosecutor to "ferret out and present every bit of potentially exculpatory evidence." *United States v. Page, supra*, at 728.

Based upon this Court's examination of all documents presented and authorities cited regarding this matter, and in conjunction with the Court's adherence to the standards of prosecutorial divulgement as set forth in *Page, supra*, the Court finds that Defendant Williams' Motion to Dismiss Indictment must be denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant Williams' Motion to Dismiss Indictment should be and is hereby denied.

IT IS FURTHER ORERED, ADJUDGED AND DECREED that the unedited transcripts of Grand Jury testimony presented to the Court for *in camera* review do not contain substantial exculpatory evidence such that disclosure of the entire transcripts,

in addition to the edited transcripts already provided to Defendant and his counsel, must be made. The unedited transcripts will therefore remain with the Court.

FINALLY, IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, Defendant's counsel having made a satisfactory response to the government's Motion to Inquire of Defendant's Counsel with regard to his possible conflict of interest, no further inquiry will be made by this Court.

/s/ James O. Ellison
JUDGE JAMES O. ELLISON
United States District Court
Northern District of Oklahoma

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA

No. 88-CR-52-E

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JOHN H. WILLIAMS, JR., DEFENDANT

ORDER

[Filed Nov. 7, 1988]

This matter comes before the Court in the posture of a motion for reconsideration. The Defendant, John H. Williams, Jr., moved the Court on October 3, 1988 for dismissal of the indictment on the grounds that the government withheld substantial exculpatory information in its possession from the grand jury. The Court denied the motion in an order filed October 14, 1988. Defendant moved the Court to reconsider its order on October 17, 1988. The Court heard extensive argument and again reviewed the evidence on October 18, 1988. The Court held at the conclusion of the hearing that the evidence withheld by the government was substantial exculpatory information and that on account of the government's

failure to present this to the grand jury the indictment should be dismissed without prejudice.

Williams was indicted by a grand jury on May 4, 1988 for the alleged violation of 18 U.S.C. § 1014. Section 1014 makes it a crime for someone to knowingly make a false statement concerning a material fact to a financial institution for the purpose of influencing the financial institution's action. The indictment contains seven separate counts involving original and renewal loan requests made by Williams to four federally insured banking institutions within this judicial district. In substance the seven counts together allege that Defendant knowingly overvalued his current assets to obtain approvals and renewals of various loans. With the exception of Count 2, which involves oral statements allegedly made to a bank, all of the offenses charged by the government allege that these overvaluations were made by Williams in his financial statements, income statements, or projected income statements. These alleged overvaluations concern the stated value for income (including interest income), collateral and notes receivable.

Defendant contends that the government failed to present substantial exculpatory evidence in its possession to the grand jury, and as a result the indictment should be dismissed. In agreeing with the Defendant, the Court is guided by the standard of dismissal recently articulated by the United States Supreme Court in *Bank of Nova Scotia v. United States*, —— U.S. ——, 108 S.Ct. 2369 (1988), and by the decisions of this Circuit regarding exculpatory evidence.

In *Nova Scotia* the Supreme Court addressed the issue of the prejudice that must be shown as a predi-

cate to the district court's exercise of its supervisory powers to dismiss an indictment on the basis of prosecutorial misconduct. The court affirmed a decision by the United States Court of Appeals for the Tenth Circuit in *United States v. Kilpatrick*, 821 F.2d 1456 (1987), that the prosecutorial misconduct in that case was insufficient to warrant dismissal of the indictment. Initially the Court examined the "standard of prejudice" to be applied by district courts when a defendant requests dismissal of the indictment before trial. The Court stated that when dismissal is sought for non-constitutional error it would adopt the standard articulated by Justice O'Connor in her concurring opinion in *United States v. Mechanik*, 475 U.S. 66, 106 S.Ct. 938 (1986). Justice Kennedy stated:

> Under this standard, dismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict' or if there is 'grave doubt' that the decision to indict was free from substantial influence of such violations.

—— U.S. at ——, 108 S.Ct. at 2374.

The conduct at issue in *Nova Scotia* was alleged misuse of IRS agents in violation of Fed.R.Crim.P. 6(d), the treatment of witnesses, the grant of "pocket immunity" to certain witnesses, and the defendant's claim that summaries used by IRS agents before the grand jury were inaccurate. The court found that the conduct, considered either separately or cumulatively, failed to "raise a substantial question, much less a grave doubt as to whether [the conduct] had a substantial effect on the grand jury's decision to charge". —— U.S. at ——, 108 S.Ct.

2378. Addressing each instance of alleged misconduct in turn, the Court found that either the conduct could not have substantially affected the grand jury's decision, or that the district court record failed to support the allegation of prosecutorial misconduct. The Court also noted two points: (1) that the instances of alleged misconduct occurred as "isolated episodes in the course of a twenty-month investigation, an investigation involving dozens of witnesses and thousands of documents", *Id.*; and (2) that the type of errors alleged could be remedied by means other than dismissal, such as contempt of court or disciplinary proceedings, *Id.*

Nova Scotia did not involve a prosecutor's decision to withhold exculpatory evidence from the grand jury. This conduct has been addressed by the Tenth Circuit in *United States v. Page*, 808 F.2d 723, *cert. denied*, 107 S.Ct. 3195 (1987). *Page* presented the appeal of a conviction for racketeering activities. One of the issues on appeal concerned the extent of a prosecutor's duty to discover and present exculpatory evidence to the grand jury. The Court initially noted that other courts have ruled that a prosecutor owes no duty to present exculpatory evidence to a grand jury. The *Page* court, however, explicitly rejected those decisions and adopted the rule that when substantial exculpatory evidence is discovered in the course of an investigation, it must be revealed to the grand jury, although the prosecutor is "not obliged to ferret out and present every bit of potentially exculpatory evidence", 808 F.2d at 728. The Court reasoned that "[t]his rule promotes judicial economy. If a fully informed grand jury cannot find probable cause to indict, there is little chance the prosecution

could have proved guilt beyond a reasonable doubt to a fully informed petit jury." *Id.*[1]

The *Nova Scotia* standard for dismissal, when considered against a prosecutor's duty to disclose substantial exculpatory evidence, compels dismissal of the indictment in this case. From a review of the evidence withheld from the grand jury the court concludes that the prosecution had substantial exculpatory evidence in its possession, which the prosecutor had a duty to present to the grand jury, and that the absence of this evidence substantially influenced the grand jury's decision to indict.

The evidence withheld falls generally into two categories: (1) written material generated in the bankruptcy proceedings involving Defendant and his wife.[2] This material included Defendant's deposition in bankruptcy adversary proceedings in which he explains his balance sheet, income statement, the method of their preparation, and his beliefs regarding the asset values assigned, as well as a discussion by the Defendant of his venture capital investments and statements made to bankers regarding those investments; and (2) financial statements, tax records, and general records of the Defendant prepared by Defendant and his accounting firm over a period of years.[3] This evidence is relevant to an essential ele-

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[1] The rationale behind this rule has also been stated as promoting the mission of the grand jury "to clear the innocent, no less than to bring to trial those who may be guilty." *United States v. Phillips Petroleum Company*, 435 F.Supp. 610, 618 (N.D. Okla. 1977).

[2] In re: John H. Williams, Jr. and Carol S. Williams, Case No. 86-00475, United States Bankruptcy Court for the Northern District of Oklahoma.

[3] Defendant contends that government interviews of various persons including Defendant's brother, a financial con-

ment of the crime charged, the issue of Defendant's intent to make materially false statements upon which the banks would rely. The evidence also is substantially exculpatory on the issue of intent when the evidence is examined as a whole. "Exculpatory evidence" has been defined as "evidence which creates a reasonable doubt about the Defendant's guilt". *United States v. Gray*, 502 F.Supp. 150, 152 (D.C. D.C. 1980).

With regard to the written material generated in the bankruptcy adversary proceedings, the court notes that Defendant was subpoenaed by the grand jury but only to produce documents. The government obtained documents subpoenaed and others from the trustee in bankruptcy or his counsel. Defendant was not asked to testify before the grand jury. An examination of Defendant's deposition and the exhibits to the deposition reveals substantial exculpatory material. The Defendant explains his balance sheets and income statements in detail, the method of their preparation, and his beliefs with regard to the asset values assigned. The deposition also contains significant discussion by Defendant of his venture capital investments and statements made to bankers regarding those investments. Without the benefit of Defendant's testimony before the grand jury this written material would be highly useful to the grand jury in evaluating Defendant's intent. For example,

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sultant engaged by Defendant, a principal of a venture capital firm in which Defendant invested, and an official of a bank with which Defendant did business are relevant to Defendant's state of mind in that those interviews reveal Defendant's faith in the ultimate success of his venture capital investments. The Court finds however that this evidence is not substantially exculpatory and that other evidence withheld is more relevant to Defendant's state of mind.

a primary contention of the government is that Defendant overvalued notes receivable from venture capital companies in which he had heavily invested, that is, that Defendant knew the notes receivable from these companies were substantially overvalued or worthless. Defendant's deposition, though, contains a discussion of his experience with venture capital investments, and particularly, with the Lexel Corporation. Defendant invested over $500,000 in Lexel and guaranteed substantial Lexel bank debt between 1973 and 1978. Lexel had negative capital for several years and could not pay interest in accordance with the terms of its note. In 1983 Defendant sold his investment in Lexel for over $4,500,000. Defendant's experience with venture capital investments raises doubt about Defendant's intent to defraud the banks when he listed notes receivable from such companies at face value.

With regard to Defendant's financial records, the government knew that Defendant's financial statements had been prepared since 1975, on at least a semi-annual basis, with the assistance of the Horter Company and knew of the procedures and formats used by the Defendant and Horter in preparing these statements. Horter also maintained Defendant's general ledger and participated in the preparation of Defendant's tax returns. This material was in the possession of the government. The statements as to income and expense on the financial statements at issue in the indictment were drawn from these ledgers, which were also used to prepare Defendant's tax returns. This written material reveals a consistent format of reporting over a period of years and consistency in the figures reported from form to form. If the government had presented to the

grand jury this information within its possession, the grand jury would have been aware that the Defendant's inclusion of interest income on the financial statements at issue was consistent with the general ledgers maintained by Horter with Defendant's federal income tax returns and with Defendant's bank statements. Likewise, the grand jury would have been aware that the Defendant, with the assistance of Horter, presented figures as to note balances which comprised the notes receivable portion of the financial statements that were consistent with the face value of the notes on the general ledgers. The tax records, general ledgers and statements are evidence which would indicate a lawful basis for the information Defendant provided to the banks, as opposed to any indication of intent to defraud those banks.

In short, the government had in its possession substantial exculpatory information that would have assisted the grand jury in fairly evaluating intent within the context of all the relevant evidence. The information withheld raises reasonable doubt about the Defendant's intent to defraud. The absence of this substantial exculpatory evidence on perhaps the most crucial element of the crime charged renders the grand jury's decision to indict gravely suspect.

IT IS THEREFORE ORDERED that the indictment in this case is dismissed without prejudice.

ORDERED this 4th day of November, 1988.

/s/ James O. Ellison
JAMES O. ELLISON
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Nos. 88-2827
88-2843

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT/CROSS-APPELLEE

v.

JOHN H. WILLIAMS, JR.,
DEFENDANT-APPELLEE/CROSS-APPELLANT

ORDER

Filed April 22, 1991

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges.

The court has considered appellant/cross-appellee's petition for rehearing and the appellee/cross-appellant's petition for rehearing and suggestion for rehearing en banc, together with the briefs, memoranda, and the supplemental sealed record on appeal.

Appellant/cross-appellee's petition for rehearing is denied by the panel to whom it was submitted.

Appellee/cross-appellant's petition for rehearing is denied by the panel to whom it was submitted. In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all the judges of the court in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Appellee/cross-appellant's motion for access to the sealed portions of the record, Supplemental Volume I, is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

☆ U. S. GOVERNMENT PRINTING OFFICE, 1991 282061 20577

Supreme Court, U.S.
FILED
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(2)

No. 90-1972

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN H. WILLIAMS, JR.

Petition for Writ Of Certiorari To The United States Court of Appeals For The Tenth Judicial Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Attorneys for John H. Williams, Jr.

August 23, 1991

QUESTION PRESENTED

Whether an indictment may be dismissed without prejudice, pursuant to the district court's supervisory powers, when the government withholds from the grand jury substantial exculpatory evidence negating an essential element of the offense charged.

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 1

Constitutional Provision Involved 2

Statement of the Case 2

Summary of the Argument 2

Argument 3

A. The "Question Presented" in the Petition Was Never Raised Below 3

B. The Holding in This Case Does Not Conflict With Decisions in Other Circuits 9

Conclusion 14

TABLE OF AUTHORITIES

CASES:

Bank of Nova Scotia v. United States, 487 U.S. 250 (1988) 10, 12

Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 6

Carpenters v. United States, 330 U.S. 395 (1947) 6

DeShaney v. Winnebago County DSS, 489 U.S. 189 (1989) 5

Duignan v. United States, 274 U.S. 195 (1927) 5

Equal Employment Opportunity Commission v. Federal Labor Relations Authority, 476 U.S. 19 (1986) 5

Jean v. Nelson, 472 U.S. 846 (1985) 9

TABLE OF AUTHORITIES – Continued

Page

Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988) 9

Montana Ry. Co. v. Warren, 137 U.S. 348 (1890) 6

NCAA v. Board of Regents of Univ. of Ok., 468 U.S. 85 (1984) 5

New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) 9

Old Jordan Mining & Milling Co. v. Societe Anonyme des Mines, 164 U.S. 261 (1896) 6

Rogers v. Lodge, 458 U.S. 613 (1982) 5

Sonzinsky v. United States, 300 U.S. 506 (1937) 5

United States v. Adamo, 742 F.2d 927 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985) 11

United States v. Bowen, 500 F.2d 960 (9th Cir. 1974), *aff'd*, 422 U.S. 916 (1975) 8

United States v. Bucci, 839 F.2d 825 (1st Cir.), *cert. denied*, 488 U.S. 844 (1988) 11

United States v. Giorgi, 840 F.2d 1022 (1st Cir. 1988) 12

United States v. Hawkins, 765 F.2d 1482 (11th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986) 11

United States v. Larrazolo, 869 F.2d 1354 (9th Cir. 1989) 11

United States v. Lovasco, 431 U.S. 783 (1977) 7

United States v. McClintock, 748 F.2d 1278 (9th Cir. 1984), *cert. denied*, 474 U.S. 822 (1985) 11

United States v. Mendenhall, 446 U.S. 544 (1980) 7

United States v. Nathan, 816 F.2d 230 (6th Cir. 1987) 12

TABLE OF AUTHORITIES – Continued

Page

United States v. O'Keefe, 825 F.2d 314 (11th Cir. 1987) 12

United States v. Ortiz, 422 U.S. 891 (1975) 8

United States v. Page, 808 F.2d 723 (10th Cir. 1987), *cert. denied*, 482 U.S. 918 (1987) ..... *passim*

United States v. Peterson, 698 F.2d 921 (8th Cir. 1982) 12

United States v. Rivera-Santiago, 872 F.2d 1073 (1st Cir.), *cert. denied*, 492 U.S. 910 (1989) 10, 11

United States v. Samango, 607 F.2d 877 (9th Cir. 1979) 12

United States v. Santana, 427 U.S. 38 (1976) 6

United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) 6

United States v. Vincent, 901 F.2d 97 (8th Cir. 1990) .10, 11

United States v. Wilson, 798 F.2d 509 (1st Cir. 1986) 10

Youakim v. Miller, 425 U.S. 231 (1976) 6

STATUTE:

28 U.S.C. § 1254(1) 1

MISCELLANEOUS:

United States Attorneys' Manual, § 9-11.233 (1988) 13

No. 90-1972

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN H. WILLIAMS, JR.

Petition for Writ Of Certiorari To The United States Court of Appeals For The Tenth Judicial Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals is reprinted in the Appendix to the Petition for a Writ of Certiorari ("Petition"), at pages 1a-15a. The unreported Order of the District Court is also included in the Appendix to the Petition at pages 19a-26a.

JURISDICTION

The jurisdiction of the Court has been invoked by petitioner under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Respondent contends that no constitutional provision is involved in this litigation, nor has any constitutional issue been raised at any point in these proceedings by the government.

STATEMENT OF THE CASE

Accurate statements of the factual and procedural history and circumstances of this case are found in the orders of the District Court and the Court of Appeals, copies of which are appended to the Petition. Respondent will not further elaborate on the facts here. Respondent notes, however, that the government's recitation of the facts is far from complete and, in one critical respect, misrepresents the record. Specifically, the government attributes to the District Court the observation that " * * * respondent used an unconventional method to account for his current assets." Petition pp. 5-6. This is not true. The District Court did not characterize respondent's method of accounting as "unconventional." Rather, the court specifically concluded that a notation included in the respondent's financial statements put the banks on notice that those financial statements were not prepared in accordance with generally accepted accounting principles. Petition App. 10a.

SUMMARY OF THE ARGUMENT

The question presented in the Petition was neither presented to nor addressed by the courts below. Moreover, even if the issue had been presented, there is no conflict among the circuits involving cases where, as here, the prosecutor withheld from the grand jury *substantial* exculpatory evidence negating guilt.

ARGUMENT

A. The "Question Presented" in the Petition Was Never Raised Below.

The government claims that the question presented by its Petition is "[w]hether an indictment may be dismissed because the government failed to present exculpatory evidence to the grand jury." Petition p. (I). This was not the issue upon which the decisions of the trial and appellate courts turned in this case. More importantly, with respect to the question of whether the case is one which calls for the exercise of this Court's extraordinary and discretionary jurisdiction, the issue was never raised or urged by the government in any stage of these proceedings prior to the filing of the Petition.[1]

Indeed, in the District Court and on appeal the government unequivocally embraced the very principles which it now asks this Court to review. The government consistently asserted that it had fully complied with its

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[1] Aside from the fact that the question presented by the government in its Petition was neither pressed nor passed upon below, the argument found in the Petition has no relationship to the issue which the government claims is presented. The Petition repeatedly describes the Tenth Circuit's holding to be that the grand jury must receive any information that is relevant to any reasonable theory it may adopt. *E.g.*, Petition pp. 5, 7, 10, 12, 13 and 16. Although language to this effect is found in the Court of Appeals' opinion (Petition App. 8a), it was not the court's "holding." Instead, the Court of Appeals affirmed the District Court's finding that the government had in its possession substantial exculpatory information "on perhaps the most crucial element of the crime charged. . . . " Petition App. 26a. The court also upheld the District Court's finding that withholding this evidence from the grand jury rendered its "decision to indict gravely suspect." *Id.*

obligations under controlling authorities of the Tenth Circuit and this Court by supplying exculpatory evidence to the grand jury. For example, in a brief filed on appeal the government stated:

> The government has acknowledged that it has certain responsibilities under the case of *United States v. Page*, 808 F.2d 723 (10th Cir. 1987), and that [sic] includes a duty to not withhold substantial exculpatory evidence from a grand jury if such exists. * * * The government would contend that although it may not have been familiar with the *Page* case by name, it was familiar with and complied with the principles stated in the case.

Gov't C.A. Resp. Br. at 9-10.

The government's position throughout this litigation has been that it complied with its duty to disclose substantial evidence which directly negates the guilt of a subject of the investigation. *See United States v. Page*, 808 F.2d 723, 727-28 (10th Cir.), *cert. denied*, 482 U.S. 918 (1987). The government never took issue with its obligation or with the holding in *Page*, but instead challenged whether the evidence at issue was either substantial or exculpatory.

> The government contends that *Page, supra*, requires the government to present to the grand jury evidence which is clearly substantially exculpatory. The government has shown that the evidence which the defendant argues is exculpatory is neither substantial nor clearly exculpatory; thus, the government did not err in failing to present it to the grand jury, and the trial court did err in dismissing the indictment.

Id. at 11. Similarly, in its Brief in Chief to the Tenth Circuit the government was quick to recognize that the Court *should follow* its prior decision, stating "[t]he government

would assert that this Court should follow the holding of *Page*. . . . " Gov't C.A. Brief in Chief at 43. The Court of Appeals (as well as the District Court), however, recognized that the government's factual arguments were not supported by the record.[2] The government did not seek rehearing en banc so that the Tenth Circuit as a whole could consider a challenge to the fundamental proposition that a prosecutor in possession of substantial exculpatory evidence negating guilt must disclose that evidence to the grand jury.

Issues not raised in the Court of Appeals, but included in a petition for a writ of certiorari, will not normally be considered by this Court. *E.g., DeShaney v. Winnebago County DSS*, 489 U.S. 189, 195 n. 2 (1989); *Equal Employment Opportunity Commission v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986). Similarly, issues not assigned as error in the Court of Appeals will not be addressed by this Court on certiorari. *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937). "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Duignan v. United States*, 274 U.S. 195, 200 (1927). "Exceptional circumstances" have been limited to those situations in which jurisdictional issues have been overlooked in the

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[2] The District Court's conclusion that the government withheld substantial exculpatory evidence was a finding of fact. Petition App. 4a. This Court accords great weight to a finding of fact which has been made by a District Court and affirmed by a Court of Appeals. *E.g., NCAA v. Board of Regents of Univ. of Ok.*, 468 U.S. 85, 98 n. 15 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). Moreover, the government does not ask this Court to set aside any factual findings of the District Court; instead it argues that the lower courts erred as a matter of law.

lower courts, *e.g., United States v. Storer Broadcasting Co.*, 351 U.S. 192, 197 (1956), when plain error has occurred and not been assigned as error, *e.g., Carpenters v. United States*, 330 U.S. 395, 412 (1947), when the Court considers a statutory issue not raised below in order to avoid reaching a constitutional issue, *e.g., Youakim v. Miller*, 425 U.S. 231, 234-35 (1976), or when the Court concludes that one of its previous opinions is no longer valid. *E.g., Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation*, 402 U.S. 313, 320 (1971). None of these situations is presented in the instant case.

The rule which requires a party seeking review in this Court to raise the issues below is well established. Early cases following the rule articulated reasons for its existence. In *Montana Ry. Co. v. Warren*, 137 U.S. 348 (1890), the Court stated:

> It is fundamental that when the judgment of a court is challenged in error its rulings alone are open to consideration. Of course, if the trial court had no jurisdiction, that is a matter which is always open, and the attention of the court of last resort may be called thereto in the first instance; but mere matters of error may always be waived and they are waived when the attention of the reviewing court is not called to them.

Id. at 351. In *Old Jordan Mining & Milling Co. v. Societe Anonyme des Mines*, 164 U.S. 261 (1896), the Court observed that "[i]f the action of the court below were correct as to the errors insisted upon as ground for reversal, none others will be considered here." *Id.* at 265.

The rule that questions not raised below will not be considered by this Court is applicable in criminal cases. In *United States v. Santana*, 427 U.S. 38 (1976), this Court did not reach the issue of whether the respondent had

standing to protest allegedly illegal seizures because the government did not raise the issue below. *Id.* at 41 n. 2. It does not appear that this Court has ever held that "exceptional circumstances" existed, thereby allowing review of a question not raised below, when the government has sought certiorari in a criminal case.[3]

In *United States v. Lovasco*, 431 U.S. 783 (1977), in the context of a dismissal of an indictment on speedy trial grounds, the government argued before this Court that the district court should have deferred action on the motion to dismiss until after trial, at which time it could have assessed any prejudice to the respondent in light of the events at trial. The *Lovasco* Court stated:

> This argument, however, was not raised in the District Court or in the Court of Appeals. Absent exceptional circumstances, we will not review it here. . . .
>
> * * *
>
> But even assuming that the basis for the District Court's dismissal could have "skewed" appellate proceedings regarding the procedural question, the fact is that the opening paragraph of the argument in the Government's brief below

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[3] *But cf. United States v. Mendenhall*, 446 U.S. 544 (1980), in which Justice Stewart, joined by Chief Justice Rehnquist, concluded that an issue not raised in the lower courts could be considered by this Court. Justice Stewart reasoned that "exceptional circumstances" existed where the decisions of the lower courts rested "on a serious misapprehension of federal constitutional law" and "determination of the question [was] essential to the correct disposition of the other issues in the case. . . . " *Id.* at 551 n. 5. The balance of the Court expressly declined to adopt such a construction of "exceptional circumstances." *Id.* at 560 and 570 n. 2.

> recognized that the only issue before the court was a due process question, and the remainder of the brief treated that question on the merits. And even after the Court of Appeals issued its decision based solely on the Due Process Clause, the Government's petition for rehearing did not squarely raise the procedural issue as an alternative ground for rehearing the case en banc.

Id. at 788 n. 7 (citations omitted).

United States v. Ortiz, 422 U.S. 891 (1975), is similar to the case at bar. There, the government took a position in its petition for certiorari which was in conflict with its lower court position. The government had argued to the Ninth Circuit that the principles announced in *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974), *aff'd*, 422 U.S. 916 (1975), controlled the decision in *Ortiz*. On certiorari, however, the government abandoned the very principles which it had urged the Ninth Circuit to adopt. This Court refused to consider the government's argument and stated:

> Examination of the Government's brief in the Ninth Circuit indicates that it did not raise this question below. On the contrary, it represented to the court that the decision in *Bowen* would be "determinative of the issues in this case." We therefore decline to consider this issue, which was raised for the first time in the petition for certiorari.

Ortiz, 422 U.S. at 898.

Just as the government in *Ortiz* represented to the Ninth Circuit that *Bowen* would be determinative of the issues in that case, the government in the instant case acknowledged that it had a duty under *Page* to present to the grand jury substantial exculpatory evidence negating guilt. In the Tenth Circuit, the government never raised

any challenge to the principles announced in *Page*. It embraced those principles.

The government had ample opportunities to raise the issue it now asserts. Yet it did not do so. No exceptional circumstances exist which might justify this Court's review of the issue presented for the first time in the Petition. The issue which has been framed by the government does not relate to jurisdiction nor did the failure to present the issue to the lower courts result in plain error.[4] The government's Petition should be denied.

B. The Holding in This Case Does Not Conflict With Decisions in Other Circuits.

The government argues that there is a conflict in the circuits regarding a prosecutor's duty to present exculpatory evidence to a grand jury. A review of the pertinent decisions of this Court and the decisions of the Courts of

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[4] The fundamental principle which requires that courts avoid reaching a constitutional question in advance of the necessity of deciding it also precludes review by this Court. *E.g., Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 445 (1988). Before deciding a constitutional question, the courts must determine whether other non-constitutional grounds might be dispositive. *Jean v. Nelson*, 472 U.S. 846, 854 (1985); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 582 (1979). There is no need for this Court to embark upon a gratuitous analysis of, and in essence render an advisory opinion as to, a constitutional issue that was not raised in the lower courts and has not been properly preserved for review. This is especially true when that failure provides a specific non-constitutional basis upon which to deny the Petition.

Appeals upon which the government relies reveals that there is, in fact, no conflict between the decisions in this case and those cited by the government from other circuits. If the prosecutor's conduct is such that it taints the grand jury process, the district court has the authority to dismiss an indictment, whether it is exercised as part of its constitutional or supervisory powers. No circuit court decisions have been cited by the government, nor do any exist, which conflict with this principle. The government's purported basis for certiorari review does not exist.

In affirming the dismissal of the indictment, the Tenth Circuit specifically approved the finding of the District Court that the failure to present exculpatory evidence "relevant to the critical issue of intent rendered the indictment suspect." Petition App. 14a. The Tenth Circuit relied upon *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), in which this Court stated:

> The prejudicial inquiry must focus on whether any violations had an effect on the grand jury's decision to indict. If violations did substantially influence this decision, or if there is grave doubt that the decision to indict was free from such substantial influence, the violations cannot be deemed harmless.

Id. at 263.

The government's authorities are, without exception, factually and legally distinguishable from this case. In *United States v. Rivera-Santiago*, 872 F.2d 1073 (1st Cir.), *cert. denied*, 492 U.S. 910 (1989), and *United States v. Vincent*, 901 F.2d 97 (8th Cir. 1990), the First and the Eighth Circuits specifically stated that federal prosecutors are not *normally* under a duty to disclose exculpatory evidence. *Santiago*, 872 F.2d at 1087; *Vincent*, 901 F.2d at 99. The *Santiago* court cites *United States v. Wilson*, 798 F.2d

509, 517 n. 2 (1st Cir. 1986), for the *exception* to the nondisclosure rule when the prosecutor is aware of substantial evidence negating guilt. *Vincent* cites *United States v. Bucci*, 839 F.2d 825, 831 n. 8 (1st Cir. 1988), *cert. denied*, 488 U.S. 844 (1989), which likewise obligates a prosecutor to disclose substantial exculpatory evidence negating guilt. Moreover, the *Bucci* decision favorably cites *Page* for this proposition. In these cases, the exculpatory evidence was either not substantial (*Santiago*) or was subject to interpretation (*Vincent*), and the government's reliance upon them to establish a "conflict" is curious.

The balance of the cases relied upon by the government are similarly inapposite. In *United States v. Adamo*, 742 F.2d 927 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985), the evidence the defendant claimed was exculpatory was found to be *not substantial* and was subject to differing interpretations. Likewise, in *United States v. Larrazolo*, 869 F.2d 1354 (9th Cir. 1989), the allegedly exculpatory evidence could be interpreted in inconsistent manners, was not substantial, and the government's failure to present that evidence to the grand jury did not render the proceedings fundamentally unfair. In *United States v. McClintock*, 748 F.2d 1278 (9th Cir. 1984), *cert. denied*, 474 U.S. 822 (1985), the court refused the defendant's request to dismiss the indictment because the prosecutor's actions "did not 'significantly infring[e] upon the ability of the grand jury to exercise its independent judgment.' " *Id.* at 1285. And in *United States v. Hawkins*, 765 F.2d 1482 (11th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986), the court declined to dismiss an indictment because the defendant's unsupported allegations that insufficient evidence was presented to the grand jury were irrelevant and without merit.

Here, the exculpatory evidence was found to be substantial and it expressly negated the element of criminal intent. The evidence was not speculative and it was not subject to different interpretations. As the Tenth Circuit specifically noted, the evidence could lead to the conclusion that respondent was not guilty of the charges. Petition App. pp. 9a-11a. Unlike the cases cited by the government, here the prosecutor's failure to present substantial exculpatory evidence negating guilt to the grand jury tainted its charging decision.

The government relies upon decisions rendered by the First, Sixth, Eighth, Ninth and Eleventh Circuits but it fails to address the fact that other decisions by those courts are consistent with the outcome in this case and the rule of *Page*. The First (*United States v. Giorgi*, 840 F.2d 1022 (1st Cir. 1988)), Sixth (*United States v. Nathan*, 816 F.2d 230 (6th Cir. 1987)), Eighth (*United States v. Peterson*, 698 F.2d 921 (8th Cir. 1982)), Ninth (*United States v. Samango*, 607 F.2d 877 (9th Cir. 1979)), and Eleventh (*United States v. O'Keefe*, 825 F.2d 314 (11th Cir. 1987)) Circuits all recognize that an indictment may be dismissed if the government's conduct materially affects the integrity of the grand jury process thus unduly influencing the charging decision. Those decisions neither run afoul of *Bank of Nova Scotia* nor do they conflict with the rule announced in *Page* and applied in this case.[5]

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[5] The government devotes a substantial portion of its Petition to practical burdens which it claims will result should *Page* not be overturned. Specifically, the Petition argues that application of the rule announced in *Page* will (i) burden the grand jury with the "need to explore all possible trial defenses"

(Continued on following page)

Although prosecutors are not required to "ferret out and present every bit of potentially exculpatory evidence," *Page*, 808 F.2d at 728, all the Courts of Appeals that have considered the issue have recognized that,

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(Continued from previous page)

before deciding whether to indict, (ii) obstruct the grand jury's proceedings by imposition of judicial oversight relating to whether a prosecutor has withheld exculpatory evidence, and (iii) impose significant and unjustified costs in determining "whether prosecutors had withheld exculpatory evidence from the grand jury. . . . " Petition pp. 12-13. All of these concerns relate to theories of defense, rather than the intentional withholding of substantial exculpatory evidence negating an essential element of the crime charged. More importantly, none of these purported concerns consider either the limited circumstances in which the *Page* court recognized that the prosecutor has a duty to disclose, or the facts of this case.

It is noteworthy that the "high cost" the government claims would be paid by a "regime" that would require a prosecutor to disclose substantial exculpatory evidence in his possession "so powerful that it would likely motivate a grand jury not to indict" is already an obligation of federal prosecutors throughout the land. Petition p. 15. The government has acknowledged that the United States Attorneys' Manual provides as follows:

> When a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor *must present or otherwise disclose* such evidence to the grand jury before seeking an indictment against such a person.

Id. (quoting United States Attorneys' Manual, § 9-11.233, at 15 (1988) (emphasis added)). This duty is mandatory. The regime which so concerns the government is thus already a practice adopted by and apparently followed in some sectors by the Department of Justice.

in appropriate circumstances, prosecutors must disclose substantial evidence in their possession negating guilt.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 13 1991
OFFICE OF THE CLERK

(3)

No. 90-1972

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN H. WILLIAMS, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

Cases: Page

Bank of Nova Scotia v. *United States*, 487 U.S. 250 (1988) 4
DeShaney v. *Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989) 8
Duignan v. *United States*, 274 U.S. 195 (1927) 5
EEOC v. *FLRA*, 476 U.S. 19 (1986) 8
Sonzinski v. *United States*, 300 U.S. 506 (1937) 9
Stevens v. *Department of the Treasury*, 111 S. Ct. 1562 (1991) 5
United States v. *Adamo*, 742 F.2d 927 (6th Cir. 1984), cert. denied, 469 U.S. 1193 (1985) 2
United States v. *Al Mudarris*, 695 F.2d 1182 (9th Cir.), cert. denied, 461 U.S. 932 (1983) 3
United States v. *Blanton*, 700 F.2d 298 (6th Cir. 1983), cert. denied, 465 U.S. 1099 (1984) 2
United States v. *Cederquist*, 641 F.2d 1347 (9th Cir. 1981) 3
United States v. *Hawkins*, 765 F.2d 1482 (11th Cir. 1985), cert. denied, 474 U.S. 1103 (1986) 3
United States v. *Larrazolo*, 869 F.2d 1354 (9th Cir. 1989) 3
United States v. *Lovasco*, 532 F.2d 59 (8th Cir. 1976), rev'd, 431 U.S. 783 (1977) 9
United States v. *McClintock*, 748 F.2d 1278 (9th Cir. 1984), cert. denied, 474 U.S. 822 (1985) 3
United States v. *Ortiz*, 422 U.S. 891 (1975) 9
United States v. *Page*, 808 F.2d 723 (10th Cir.), cert. denied, 482 U.S. 918 (1987) 1, 2, 6, 7
United States v. *Rivera-Santiago*, 872 F.2d 1073 (1st Cir.), cert. denied, 492 U.S. 910 (1989) 3
United States v. *Samango*, 607 F.2d 877 (9th Cir. 1979) 5
United States v. *Santana*, 427 U.S. 38 (1976) 9
United States v. *Sears Roebuck & Co.*, 719 F.2d 1386 (9th Cir. 1983), cert. denied, 465 U.S. 1079 (1984) 2
United States v. *Vincent*, 901 F.2d 97 (8th Cir. 1990) 3

Cases—Continued: Page

Virginia Bankshares, Inc. v. *Sandberg*, 111 S. Ct. 2749 (1991) 5

Constitution:

U.S. Const. Amend. IV 9

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1972

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN H. WILLIAMS, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent does not defend the court of appeals' holding that prosecutors are under a duty to disclose exculpatory evidence to the grand jury. For two reasons, however, he contends that this Court should not review that holding. First, he suggests that the issue presented by the petition cannot be considered by this Court because it was not raised by the government in the lower courts. Second, he argues that there is no conflict in the circuits on the question presented.

1. Addressing the latter point first, respondent's claim that there is no circuit conflict (Br. in Opp. 9-14) is answered by the Tenth Circuit's own decision in *United States* v. *Page*, 808 F.2d 723, cert. denied, 482 U.S. 918 (1987). As we explained in our petition (at 9-10), the Tenth Circuit expressly acknowledged that its rule—that a prosecutor must disclose

exculpatory evidence to the grand jury—conflicts with the holdings of courts that "have held that there is no such duty." 808 F.2d at 727, citing *United States* v. *Adamo*, 742 F.2d 927, 937 (6th Cir. 1984), cert. denied, 469 U.S. 1193 (1985); *United States* v. *Sears Roebuck & Co.*, 719 F.2d 1386, 1394 (9th Cir. 1983), cert. denied, 465 U.S. 1079 (1984).

The Tenth Circuit was correct in stating that other courts of appeals have refused to saddle prosecutors with a duty to disclose exculpatory evidence to the grand jury. Five other circuits have held that a prosecutor has no such obligation. See Pet. 8 (citing cases). Respondent claims (Br. in Opp. 10) that, "without exception, these cases are factually and legally distinguishable." Distinctions, of course, may be drawn between any two decisions, but respondent fails to show why any of the distinctions he draws are legally relevant. It is difficult to see, for example, how the Sixth Circuit could have been clearer in holding that "[a] federal prosecutor is not obligated to present exculpatory evidence to the grand jury. * * * [T]he prosecutor did not violate an affirmative duty to disclose exculpatory evidence to the grand jury because there is no such duty." *Adamo*, 742 F.2d at 937.[1] Similarly, the Ninth Circuit has unequivocally

[1] Respondent's statement (Br. in Opp. 11) that the court in *Adamo* found the exculpatory evidence to be *"not substantial"* is not borne out by the court's opinion. The court simply characterized each item of withheld evidence as "exculpatory" and held that "[s]ince disclosure of exculpatory evidence is not required, it follows that failure to disclose cannot constitute prosecutorial misconduct productive of a biased grand jury." 742 F.2d at 938. See also *United States* v. *Blanton*, 700 F.2d 298, 311 (6th Cir. 1983) ("[T]he government is under no duty to provide evidence which would be favorable to the defendant."), cert. denied, 465 U.S. 1099 (1984).

held that its precedents do "not impose an affirmative duty on the prosecutor to present exculpatory evidence. * * * 'The prosecutor has no duty to present to the grand jury all matters bearing on the credibility of witness *or any exculpatory evidence.*'" *United States* v. *Larrazolo*, 869 F.2d 1354, 1359 (1989).[2] The Eleventh Circuit is equally committed to the view that "[t]he government is not obligated to present exculpatory evidence to a grand jury." *United States* v. *Hawkins*, 765 F.2d 1482, 1488 (1985), cert. denied, 474 U.S. 1103 (1986).[3]

Respondent's effort to brush aside those cases based on supposed "factual" distinctions actually reveals the extraordinary breadth of the court of appeals'

[2] See also *United States* v. *Cederquist*, 641 F.2d 1347, 1353 n.3 (9th Cir. 1981) ("[A] grand jury investigation is not an adversary proceeding and the failure of the prosecution to bring forth evidence favorable to the defendants does not present a basis to dismiss an indictment."); *United States* v. *Al Mudarris*, 695 F.2d 1182, 1185 (9th Cir.) (finding no duty to disclose "any exculpatory evidence"), cert. denied, 461 U.S. 932 (1983); *United States* v. *McClintock*, 748 F.2d 1278, 1285 n.3 (9th Cir. 1984) ("We reject any argument that the indictment should be dismissed for failure of the prosecutor to present exculpatory material to the grand jury. The prosecutor has no such legal obligation."), cert. denied, 474 U.S. 822 (1985).

[3] The First and Eighth Circuits have stated, in more qualified terms, that a "prosecutor before a grand jury is not normally under a duty to disclose exculpatory evidence." *United States* v. *Rivera-Santiago*, 872 F.2d 1073, 1087 (1st Cir.), cert. denied, 492 U.S. 910 (1989); *United States* v. *Vincent*, 901 F.2d 97, 99 (8th Cir. 1990). Neither court, however, has ever dismissed an indictment because of the prosecutor's failure to present exculpatory evidence, and neither has stated that it agrees with *Page*. We do not agree with respondent (Br. in Opp. 11) that our reliance on those decisions is "curious."

holding in this case and its divergence from the rule in other circuits. While respondent claims that *Adamo* is distinguishable because the evidence there "was subject to differing interpretations," and *Larrazolo* differs because "the allegedly exculpatory evidence could be interpreted in inconsistent manners," Br. in Opp. 11, the court of appeals in this case never disputed that respondent's "exculpatory" evidence was ambiguous and susceptible to different interpretations. To the contrary, the court recognized that respondent's evidence "may seem irrelevant and self-serving under the government's theory of the case," but nevertheless held that the government was required to disclose it because "it would have been reasonable in this case for the grand jury to adopt a [different] theory," and "the grand jury must receive *any* information that is relevant to *any* reasonable theory it may adopt." Pet. App. 8a (emphasis added).[4] It is precisely the court of appeals' willingness to indulge defense theories of the case in determining whether evidence is exculpatory, and its insistence that such equivocal evidence must be disclosed on pain of dismissal of the indictment, that puts the Tenth Circuit directly at odds with the rulings of other courts of appeals.[5]

---

[4] Respondent's equation (Br. in Opp. 12 n.5) of the regime created by the Tenth Circuit with the policy of the Department of Justice to present substantial evidence that directly negates guilt (see Pet. 15 n.8) is inaccurate. The court of appeals' rule goes far beyond the Department's policy and imposes amorphous obligations on prosecutors that are enforceable, after the fact, by the sanction of dismissal.

[5] In passing, respondent implies (Br. in Opp. 10) that the court of appeals' decision is supported by *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988). *Bank of Nova Scotia*, however, addresses the degree of prejudice needed to warrant the dismissal of an indictment once it is found that a prosecutor engaged in misconduct. The issue here is whether it is misconduct at all when a prosecutor fails to present exculpatory evidence. Respondent also confuses the distinct issues of violation and remedy in relying on decisions that are said to "recognize that an indictment may be dismissed if the government's conduct materially affects the integrity of the grand jury process thus unduly influencing the charging decision." Br. in Opp. 12. Not only did none of those cases deal with the withholding of exculpatory evidence, but in only one of respondent's cases was an indictment actually dismissed (*United States* v. *Samango*, 607 F.2d 877 (9th Cir. 1979)).

2. Respondent also errs in suggesting (Br. in Opp. 3-9) that the petition should be denied for the reason that this Court will not normally review a question that was not "pressed or passed upon below." *Duignan* v. *United States*, 274 U.S. 195, 200 (1927). To begin with, the question presented was clearly "passed upon" by the court of appeals. In reliance on *Page*, the court held that "a prosecutor has the duty to present substantial exculpatory evidence to the grand jury." Pet. App. 5a. It then interpreted that standard to mean that "the grand jury must receive any information that is relevant to any reasonable theory" of defense. *Id.* at 8a. The court of appeals therefore squarely determined the issue presented by our petition.[6]

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[6] That the issue in this case was decided by the court of appeals and is an important question of federal law is sufficient to justify this Court's review. *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. 2749, 2761 n.8 (1991); *Stevens* v. *Department of the Treasury*, 111 S. Ct. 1562, 1567 (1991). As the Court stated in *Virginia Bankshares*, 111 S. Ct. at 2761 n.8:

> Respondents argue that this issue was not raised below. * * * It suffices for our purposes that the court

Respondent nevertheless claims that because the government accepted *Page* as binding circuit precedent in its court of appeals filings in this case, this Court should not consider the question presented by our petition. We do not agree. In *Page*, the court of appeals had explicitly rejected our argument that there is no duty to disclose exculpatory evidence to the grand jury.[7] Because the government prevailed in *Page* on the particular facts of that case, we had no opportunity to petition this Court for a writ of certiorari to review the court of appeals' legal ruling. The government was therefore bound to comply with *Page* in the Tenth Circuit. Although we did not ask the court of appeals to overrule *Page* in this case, we strenuously resisted its expansion to cover the sort of ambiguous evidence on which respondent relied in asserting prosecutorial misconduct. We claimed that, just as in *Page*, the particular withheld evidence cited by respondent was not substantial exculpatory evidence, Gov't C.A. Br. 42-43, and that the prosecution is not required "to present evidence to the grand jury under any theory other than its own." Gov't C.A.

below passed on the issue presented, *Stevens* v. *Department of the Treasury*, 111 S. Ct. 1562, 1567 (1991); cf. *Cohen* v. *Cowles Media Co.*, 111 S. Ct. 2513, 2517 (1991), particularly where the issue is, we believe, 'in a state of evolving definition and uncertainty.'" *St. Louis* v. *Praprotnick*, 485 U.S. 112, 120 (1988) (plurality opinion), quoting *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981), and one of importance to the administration of federal law. *Praprotnick, supra*, at 120-121.

[7] The defendant in *Page* claimed his indictment should be dismissed because the government had failed to disclose exculpatory evidence to the grand jury; as the court noted, "[t]he government counters that a prosecutor has no duty to disclose exculpatory evidence." 808 F.2d at 727. The court of appeals then rejected our submission. *Id.* at 728.

Reply Br. 15.[8] While our briefs in the court of appeals acknowledged that under the rule announced in *Page* the government has "certain responsibilities," Gov't C.A. Reply Br. 9, we also stated that the *outcome* in this case should be the same as in *Page* (*i.e.*, the indictment should not be dismissed) because in both cases "the evidence not presented (or presented in part) is as consistent with the prosecution's theory of the case as it is with the defendant's theory." Gov't C.A. Br. 42-43.[9]

There is no question that the scope of *Page* was litigated by both parties and decided by the court of appeals in this case. There is also no question that the government has raised in the Tenth Circuit its claims that a prosecutor has no duty to disclose exculpatory evidence, *Page*, 808 F.2d at 727, and that, in any event, no such duty extends to evidence that is simply "consistent with [a] possible theory" of defense. Pet. App. 11a. The court of appeals, however, by enunciating its rule in *Page* and then broadening it in the present case, has manifested a firm commit-

[8] We also argued that in this case, unlike in *Page*, "much of the evidence which the defendant complains was withheld, was in fact presented" to the grand jury. Gov't C.A. Br. 42-43. As we explained in our petition, the court rejected that argument based on an incomplete record, and the government sought rehearing so that the court could reexamine its holding in light of the full grand jury record. Pet. 6 n.1. The court, however, declined to do so. Pet. App. 27a-28a.

[9] It was in arguing that the evidence in this case is not truly exculpatory that we stated that the court of appeals "should follow the holding of *Page*." Gov't C.A. Br. 43. That is a far different point from respondent's implication (Br. in Opp. 4-5), that we urged the court to follow *Page*'s holding that there is a duty to disclose exculpatory evidence.

ment to its contrary position.[10] Accordingly, this is not a case in which the court of appeals was deprived of an opportunity to pass on the issue raised by our petition.

The cases on which respondent relies (Br. in Opp. 5-9) all involve the failure of a party to raise a particular question in the courts below. In this case, the government clearly raised the question that we have presented to this Court: whether the court of appeals improperly ordered the indictment dismissed because of a failure to present exculpatory evidence to the grand jury. The only difference between our submission in the court of appeals and our submission in this Court is that in this Court we have questioned not only the extension of *Page* to the facts of this case, but also the rule in *Page* itself. The court of appeals was not denied the opportunity to consider the issue we have presented to this Court; rather, it embraced the position that the government is required to submit exculpatory evidence to the grand jury and extended that obligation to "any information that is relevant to any reasonable theory [the grand jury] may adopt." Pet. App. 8a. The correctness of that rule, which was the subject of the litigation below, is the issue before this Court.

This case therefore has nothing in common with *DeShaney* v. *Winnebago County Dep't of Social Services*, 489 U.S. 189, 195 n.2 (1989), in which the pertinent issue was not even presented in the petition for a writ of certiorari, or *EEOC* v. *FLRA*, 476 U.S. 19, 23-24 (1986), in which a pertinent objection had not been urged before the Federal Labor Relations

[10] Between *Page* and this case, six of the ten active Tenth Circuit judges have embraced the principle challenged by our petition; no Tenth Circuit judge has indicated disagreement with that view.

Authority. See also *Sonzinski* v. *United States*, 300 U.S. 506, 514 (1937) (declining to consider issues not "assign[ed] as error below").

The criminal cases cited by respondent (Br. in Opp. 6-8) are also inapposite. In *United States* v. *Santana*, 427 U.S. 38, 41 n.2 (1976), where the Court declined to address the issue of the defendant's standing to litigate a Fourth Amendment claim because it had not been raised below, the government had stated that the issue was "not presented as an issue for resolution by this Court." See U.S. Br. 5 n.4 (No. 75-19). In *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977), unlike in this case, the court of appeals had not addressed the issue that the government urged the Court to decide; only a dissent had discussed it. See *United States* v. *Lovasco*, 532 F.2d 59 (8th Cir. 1976); *id.* at 62 (Henley, J., dissenting). And in *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975), the government reversed its position from that taken in the court of appeals, and the issue involved a peculiar question of retroactivity of a court of appeals decision that was only of passing importance even within that circuit. Here, we squarely opposed the legal rule that the Tenth Circuit adopted in *Page*; we then asserted in this case, not that *Page* was correct, but that its holding did not require dismissal of the indictment. The question presented in this case is therefore properly before this Court.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SEPTEMBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 45079

Supreme Court, U.S.
FILED
DEC 2 1991
OFFICE OF THE CLERK

No. 90-1972

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN H. WILLIAMS, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

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CERTIORARI GRANTED OCTOBER 15, 1991

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1972

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN H. WILLIAMS, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

TABLE OF CONTENTS

1.	Relevant docket entries in the district court . .	3
2.	Relevant docket entries in the court of appeals	6
3.	Indictment of John H. Williams, Jr., filed May 4, 1988	9
4.	Market Value Balance Sheet, June 30, 1984 . .	14
5.	Market Value Balance Sheet, September 30, 1984	24
6.	Market Value Balance Sheet, December 31, 1984	34
7.	Statement of Income and Expense for the Year Ending December 31, 1983	44

8. Statement of Income and Expense for the Year Ending December 31, 1984 45
9. Projected Statement of Income and Expense for the Year Ending December 31, 1984 46
10. Defendant's Motion and Brief To Compel Disclosure Of Exculpatory Evidence, dated July 1, 1988 47
11. Order, filed September 13, 1988 52
12. Order granting certiorari, dated October 15, 1991 53

The following opinions and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the petition for a writ of certiorari:

Opinion of the district court filed October 14, 1988 ..... 16a-18a
Order of the district court filed November 7, 1988 ..... 19a-26a
Opinion of the court of appeals filed March 20, 1990 ..... 1a-15a
Order of the court of appeals filed April 22, 1991 ..... 27a-28a

UNITED STATES DISTRICT COURT DOCKET

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN H. WILLIAMS, JR., DEFENDANT

No. 88-00052-E

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

US Title Section	Offenses Charged	Original Counts
18:USC 1014	FALSE statements to Bank	1-7

1988	Doc. No.	Proceedings
5-4	1	Indictment. S/I t (I/A Mag Wolfe 5-12-88 @ 10:30)
7-1	17	Motion & brief of deft for access to & inspection & copying of certain GJ records & information.
7-15	23	Response of govt to deft's mot/access to GJ records. t
9-6	40	Motion of pltf to disclose GJ transcripts to deft. t
9-7	41	Response of deft to mot/disclose GJ transcripts to deft. t
9-13	Min.	PT, mot. hrg. Govt. to submit certain docs. to Court for review to determine

1988	Doc. No.	Proceedings
		if they sh/b given to deft. All discov. mots are moot, having been worked out & are being worked out. Govt. will deliver exculpatory material to deft by 9-16-88. Court denies deft oral mot/ cont JT from 10-17-88 to Nov. dkt. Court signs O/ ext. time for tr bfs etc & O/disclos. GJ transcripts to deft. Def advises Court they don't consent to edited version of GJ trans. (JOE-J) b G. Dorrough-Ct.Rptr
9-13	42	Order, disclos. GJ transcripts to deft. (JOE-J)b c/del
10-3	46	Motion of deft to dismiss indictment. t
10-3	47	Memorandum brief in support of #46 (loose in file). t
10-6	51	Response of Govt. to deft's mo/to dismiss. ag
10-12	59	Reply brief in support of mot/dismiss. b (Loose in file)
10-14	75	Order that deft's mot/dism indictment is denied; that the unedited transcripts of GJ testimony do not contain substantial exculpatory evidence such that disclosure of the entire transcripts must be made; that deft's counsel having made satisfactory resp to the Govt's mot/inquire of deft's counsel w/regard to his possible conflict of interest, no further inquiry will be made by this court. (JOE-J) ptys/phoned, c/m t

1988	Doc. No.	Proceedings
10-18	Min.	Evid. HRG. Court hears all motions & writs testify. Court overrules pltf mot/ limine re: Keating & Wolin. Court grants deft's mot. reconsider O denying mot/dismiss & Dismisses case w/out prejudice. Court has no obj sh/Govt. decide to appeal ruling. Jury discharged. All other motions moot. (JOE-J) b
11-7	85	Order that indictment against deft. be dismissed w/o prejudice. Entered EOD 11/10/88. (JOE-J) cb c/m
11-15	86	Notice of pltf to appeal from order of 10/18/88 no dktng stmnt, no fees, processed & mld.a

UNITED STATES COURT OF APPEALS DOCKET

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN H. WILLIAMS, JR., DEFENDANT

No. 88-2827

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

11/25/88	1	[310420] Criminal case docketed. Preliminary record filed. Transcript order form due 12/2/88 for Glenn Dorrough pursuant t R. 42.1 (1b) [88-2843]
11/25/88	4	Cross-appeal schedule set. (1b) [88-2827 88-2843]
1/3/89	10	[319855] First brief on cross-appeal filed by USA in 88-2827, USA in 88-2843.
3/20/89	40	[336935] Second brief on cross-appeal filed by John H. Williams in 88-2827, John H. Williams in 88-2843.
4/5/89	48	[341257] Third brief on cross-appeal filed by USA in 88-2827, USA in 88-2843.

9/27/89	55	[381191] Case argued and submitted to Judges McKay, Seymour, Moore. (dvc) [88-2827, 88-2843]
3/20/90	56	[415533] Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. McKay, authoring judge; Seymour, Judge; Moore, Judge. [88-2827, 88-2843] (oac)
3/30/90	59	[418409] Correspondence filed by district court stating Grand Jury transcripts were not included in the record. [88-2843]
4/11/90	64	[426055] Supplemental record filed; I-IV Volume(s)—Copy filed in Volume(s): y. (1b) [88-2827, 88-2843]
5/9/90	65	[426932] Petition for rehearing [88-2843] filed by USA in 88-2843.
5/11/90	68	[427608] Petition for rehearing en banc [88-2843] filed by John H. Williams in 88-2843.
4/22/91	79	[503630] Order filed by Judge(s) Holloway, McKay, Logan, Seymour, Moore, Anderson, Tacha, Baldock, Brorby, Ebel. The court has considered appellant/cross-appellee's petition for rehearing and suggestion for rehearing en banc, together with the briefs, memoranda, and the supplemental sealed record on appeal. Appellant/cross-appellee's petition for rehearing is denied by the panel to whom it was submitted. Appellee/cross-appellant's petition for rehearing is denied by the panel to

whom it was submitted. In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all the judges of the court in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure the suggestion for rehearing en banc is denied. Appellee/cross-appellant's motion for access to the sealed portions of the record, Supplemental Volume I, is denied in 88-2843, 88-2827.

4/30/91	80	[505472] Mandate issued.
7/8/91	82	[527413] Petition for writ of certiorari filed on June 24, 1991 by Appellant USA in 88-2827, Appellee USA in 88-2843.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 88-CR-52-E

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN H. WILLIAMS, JR., DEFENDANT

INDICTMENT
[18 U.S.C. § 1014: False Statements to Bank]

THE GRAND JURY CHARGES:

COUNT 1
[18 U.S.C. § 1014]

On or before September 4, 1984, in the Northern District of Oklahoma, JOHN H. WILLIAMS, JR., knowingly did make a materially false statement and did willfully overvalue the notes receivable portion of his current assets as part of the loan request submitted by JOHN H. WILLIAMS, JR., on said date to the Village South National Bank, Tulsa, Oklahoma, a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the action of said bank to approve said loan, in that JOHN H. WILLIAMS, JR., stated and represented in said request that the notes receivable portion of his current assets was worth $6,050,062, whereas in truth and in fact, as JOHN

H. WILLIAMS, JR., then and there well knew, that said amount was materially false, and substantially overvalued, all in violation of Title 18, United States Code, Section 1014.

COUNT 2
[18 U.S.C. § 1014]

On or before September 4, 1985, in the Northern District of Oklahoma, JOHN H. WILLIAMS, JR., knowingly did make a materially false statement and did willfully overvalue his income, collateral, and notes receivable portion of his current assets, as part of his request for a loan renewal submitted by JOHN H. WILLIAMS, JR., on said date to the Village South National Bank, Tulsa, Oklahoma, a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the action of said bank to approve said loan renewal, in that JOHN H. WILLIAMS, JR., stated and represented that his statement of income and expenses for the year ending December 31, 1984, was true and accurate, that he would furnish financial information on a business he controlled, known as Plateau Electronics, that he had current notes receivable worth $6,955,000, and that Plateau Electronics, a company he owned control of, had royalties and patents worth between $4,000,000 and $7,000,000, whereas in truth and in fact, as JOHN H. WILLIAMS, JR., then and there well know, that all of the aforementioned statements and representations were materially false and that he had substantially overvalued the worth of assets, all in violation of Title 18, United States Code, Section 1014.

COUNT 3
[18 U.S.C. § 1014]

On or before November 30, 1984, in the Northern District of Oklahoma, JOHN H. WILLIAMS, JR., knowingly did make a materially false statement and did willfully overvalue the notes receivable portion of his current assets and interest income as part of the loan request submitted by JOHN H. WILLIAMS, JR., on said date to the Tulsa National Bank, Tulsa, Oklahoma, a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the action of said bank to approve said loan, in that JOHN H. WILLIAMS, JR., stated and represented that the notes receivable portion of his current assets was worth $6,050,062, and his projected interest income for the year ending December 31, 1984, was truly in the amount of $700,000, whereas in truth and in fact, as JOHN H. WILLIAMS, JR., then and there well knew, that both of the aforementioned amounts were materially false and substantially overvalued, all in violation of Title 18, United States Code, Section 1014.

COUNT 4
[18 U.S.C. § 1014]

On or before December 19, 1984, in the Northern District of Oklahoma, JOHN H. WILLIAMS, JR., knowingly did make a materially false statement and did willfully overvalue the notes receivable portion of his current assets and interest income as part of the loan request submitted by JOHN H. WILLIAMS, JR., on said date to the Tulsa National Bank, Tulsa, Oklahoma, a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the action of said bank to approve said loan, in that JOHN H.

WILLIAMS, JR., stated and represented in said request that his notes receivable portion of his current assets was worth $6,050,062, and his projected interest income for the year ending December 31, 1984, was truly in the amount of $700,000, whereas in truth and in fact, as JOHN H. WILLIAMS, JR., then and there well knew, that both of the aforementioned amounts were materially false and substantially overvalued, all in violation of Title 18, United States Code, Section 1014.

COUNT 5
[18 U.S.C. § 1014]

On or before June 26, 1985, in the Northern District of Oklahoma, JOHN H. WILLIAMS, JR., knowingly did make a materially false statement and did willfully overvalue the notes receivable portion of his current assets and income as part of the loan request submitted by JOHN H. WILLIAMS, JR., on said date to the Town and Country Bank, Bixby, Oklahoma, a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the action of said bank to approve said loan, in that JOHN H. WILLIAMS, JR., stated and represented that his notes receivable portion of his current assets was worth $7,001,462, and that his income for the year ending 1984 included interest in the sum of $199,176, whereas in truth and in fact, as JOHN H. WILLIAMS, JR., then and there well knew, that both of the aforementioned amounts were materially false and substantially overvalued, all in violation of Title 18, United States Code, Section 1014.

COUNT 6
[18 U.S.C. § 1014]

On or before August 5, 1985, in the Northern District of Oklahoma, JOHN H. WILLIAMS, JR., knowingly did make a materially false statement and did willfully overvalue the notes receivable portion of his current assets and income as part of the loan request submitted by JOHN H. WILLIAMS, JR., on said date to the Valley National

Bank, Tulsa, Oklahoma, a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the action of said bank to approve said loan, in that JOHN H. WILLIAMS, JR., stated and represented in said request that for the year ending 1983 his interest income was $471,682, that for the year ending 1984 his interest income was $199,176, and that his notes receivable portion of his current assets was worth $6,954,852, whereas in truth and in fact, as JOHN H. WILLIAMS, JR., then and there well knew, that all of the aforementioned amounts were materially false and substantially overvalued, all in violation of Title 18, United States Code, Section 1014.

COUNT 7
[18 U.S.C. § 1014]

On or before November 5, 1985, in the Northern District of Oklahoma, JOHN H. WILLIAMS, JR., knowingly did make a materially false statement and did willfully overvalue the notes receivable portion of his current assets and income as part of his request for a loan renewal submitted by JOHN H. WILLIAMS, JR., on said date to the Valley National Bank, Tulsa, Oklahoma, a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the action of said bank to approve said loan renewal, in that JOHN H. WILLIAMS, JR., stated and represented in said request that for the year ending 1983 his interest income was $471,682, that for the year ending 1984 his interest income was $199,176, and that his notes receivable portion of his current assets was worth $6,954,852, whereas in truth and in fact, as JOHN H. WILLIAMS, JR., then and there well knew, that all of the aforementioned amounts were materially false and substantially overvalued, all in violation of Title 18, United States Code, Section 1014.

A TRUE BILL.

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Market Value Balance Sheet
June 30, 1984

ASSETS

CURRENT ASSETS:	
Cash (Note 1)	$ 86,466
Marketable securities (Note 2)*	1,590,850
Other securities (Note 3)*	1,290,272
Notes receivable (Note 4)	6,050,062
Accounts receivable (Note 5)	922
Total current assets	9,018,572
INVESTMENTS:	
Equities in partnerships, joint ventures and oil properties (Note 6)*	2,182,827
Real estate (Note 7)*	594,500
	2,777,327
OTHER ASSETS:	
Residence and personal property (Note 8)	1,708,975
Deposits	222
Memberships	11,463
Cash surrender value of life insurance	26,867
Office furniture and fixtures	12,259
	1,759,786
	$13,555,685

LIABILITIES AND NET WORTH

CURRENT LIABILITIES:	
Notes payable (Note 9)	$ 4,137,629
Accounts payable	5,000
Current portion of long-term debt (Note 10)	130,775
Total current liabilities	4,273,404
LONG-TERM DEBT (Note 10)	620,199
NET WORTH	8,662,082
	$13,555,685

* Marketable securities and certain investments have been adjusted to reflect fair market value on March 31, 1984. All other assets are reflected at cost or other tax basis.

/s/ JOHN H. WILLIAMS, JR.

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
June 30, 1984

1. CASH

Bank of Oklahoma – checking	$ 42,968
Bank of Commerce – checking	4,662
Commercial Bank & Trust Co. – checking	3,770
First National Bank & Trust Co. – checking	7,279
MidAmerica Fund – checking	10,178
Sunbelt Bank and Trust – checking	2,510
Union National Bank – checking	703
United Bank – checking	4,036
Utica National Bank & Trust Co. – checking	644
Western National Bank – checking	1,570
Woodland Bank – checking	869
Bank of Oklahoma – savings	5,993
Utica National Bank & Trust – savings	1,284
	$ 86,466

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
June 30, 1984

	Shares, Units or Par Value	Cost	Market Value
2. MARKETABLE SECURITIES INVESTMENT STOCKS AND BONDS:			
Convertible Yield Securities, Inc.	1,413.175	$17,601	$16,220
Cooper Laboratories	1,035	927	24,840
CooperVision, Inc.	2,000	2,200	46,000
Napco Industries, Inc. Preferred	106	3,710	1,110
The Williams Companies	9,290	10,516	243,860
		34,954	332,030
BEAR STEARNS & CO.:			
American Physicians Service Group, Inc.	1,000	6,750	7,000
Quest Medical, Inc.	1,000	9,075	4,000
		15,825	11,000
A. G. EDWARDS & SONS, INC.:			
Stocks			
Sunrise Medical, Inc.	1,000	13,212	10,500
Telex Corporation	500	11,828	13,370
The Williams Companies	3,000	86,093	78,750
		111,133	102,620
Options			
Call/Major Mkt. 110 Sept.	3	1,395	1,270
Call/TC 25 September	5	(825)	(1,680)
Call/WMB 30 November	30	(6,175)	(2,250)
		(5,605)	(2,660)
Credit balance		(54,171)	(54,170)
		51,357	45,790
GOLDMAN, SACHS & CO.:			
Debit balance		516,022	516,020

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
June 30, 1984

	Shares, Units or Par Value	Cost	Market Value
2. MARKETABLE SECURITIES (Cont.)			
MERRILL LYNCH:			
Stocks			
The Williams Companies	15,000	$ 17,425	$393,750
Options			
Call/WMB 30 August	100	(13,138)	(2,500)
Credit balance		(227,347)	(227,340)
		(223,060)	163,900
ROTAN MOSLE, INC.:			
Stocks			
Pioneer Corp. Texas	1,000	28,068	27,120
Texas Air Corp.	1,000	10,304	7,500
The Williams Companies	25,300	467,400	664,120
		505,772	698,750
Options			
Call/WMB 30 August	88	(12,536)	(2,200)
Call/WMB 30 November	40	(5,705)	(3,000)
		(18,241)	(5,200)
Credit balance		(423,242)	(423,242)
		64,289	270,300
L. F. ROTHSCHILD, UNTERBERG, TOWBIN:			
Debit balance		11	11

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
June 30, 1984

	Shares, Units or Par Value	Cost	Market Value
2. MARKETABLE SECURITIES (Cont.)			
SOUTHWEST SECURITIES:			
Stocks			
BancOklahoma Corp. ...	800	$ 8,750	$17,200
Comcoa, Inc. Units 2 Com & 1 Wt.	1,000	5,000	1,750
EDP Systems, Inc.	5,000	10,000	6,875
MCI Communications Corp.	500	7,570	3,750
National Royalty Corp. ..	10,000	20,000	5,000
Ozark Air Lines, Inc.	500	7,641	3,938
Spectra-Physics, Inc.	100	1,475	2,350
Tectel, Inc. Units 2 Com & 1 Wt.	1,000	5,000	875
Trinity Industries, Inc. ...	500	8,895	9,000
The Williams Companies .	23,500	83,863	616,875
The Williams Companies .	1,900	(41,841)	(49,875)
		116,353	617,738
Options			
Call/WMB 30 August ...	105	(13,815)	(2,625)
Call/WMB 30 November	10	(1,789)	(750)
		(15,604)	(3,375)
Credit balance		(362,587)	(362,587)
		(261,838)	251,776
		$197,560	$1,590,850

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
June 30, 1984

	Shares, Units or Par Value	Cost	Market Value
3. OTHER SECURITIES			
INVESTMENT STOCKS AND BONDS:			
American Magnetics, Inc.	4,550,000	$ 117,000	$ 10,000
American Magnetics, Inc. Preferred	392,000	392,000	392,000
Bed Check Corp.	5	–	100
Buffalo Pictures of America, Inc.	902.527	–	–
Earth Salt Comp.	5	500	–
Endex, Inc.	59,698	298,490	10,000
Endex, Inc. cv. 10%-1987	200,000	200,000	200,000
The Fairson Comp.	600	39,811	1,000
The Horter Comp.	1,500	1,500	1,500
Oil Originals, Inc.	23,000	1,000	1,000
Optronics, Inc.	12,043	198,729	391,300
Optronics, Inc. cv. 10.5%-1984	26,000	26,000	26,000
Optronics, Inc. cv. 10.5%-1985	35,000	35,000	35,000
Optronics, Inc. cv. 14%-1985	70,000	70,000	70,000
Optronics, Inc. Preferred	114	114,000	114,000
Plateau Electronics	32	20,000	20,000
Riverside Telephone Company	10,000	10,000	10,000
Skyfield Productions-Class A	100	5,000	5,000
Skyfield Productions-Class B	230	2,674	2,600
Wabash Valley Fair Association, Inc. 2nd Mortgage Bond, 7.50% – 3-1-80	1,000	1,000	600
		$1,532,704	$1,290,200

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
June 30, 1984

4. NOTES RECEIVABLE

Ann Bein	$ 11,550
Bridges for Peace	4,959
Earth Salt Company	1,500
Endex, Inc.	972,258
The Fairson Company	85,500
Fletcher Gregory	200
Metro Christian Academy	2,849
Oil Capitol, Ltd.	232,456
Oil Originals, Inc.	109,500
Duncan M. Payne	4,270
Plateau Electronics	1,822,500
Skyfield Productions, Inc.	2,760,520
Venice Property	17,000
Henry Weinstein	25,000
	$6,050,062

5. ACCOUNTS RECEIVABLE

The HIM Company	$ 350
Optronics, Inc.	572
	$ 922

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
June 30, 1984

6. EQUITIES IN PARTNERSHIPS, JOINT VENTURES AND OIL PROPERTIES

	Cost	Market Value
The Chesnut Company	$ (829,976)	$ (345,292)
Elwood Investments Company	70,531	225,782
H & A Partners, Ltd.	(9,900)	1,000
The HIM Company	(152,948)	236,337
The Kensington Company, Ltd.	(235,342)	1,400,000
The Lyndon Company	54,000	54,000
Renovation Associates, Ltd.	7,906	200,000
Venice Property Investment	191,000	300,000
WILMAC Company	286,224	75,000
Oil Properties (leasehold costs & tangible equipment)	7,125	36,000
	$ (611,380)	$2,182,827

7. REAL ESTATE

Linville, N.C. – 1.1 acres	$ 16,348	$ 105,000
Lake Property – Oakwood Point	433,173	450,000
Terre Haute, Indiana – 20.20 acres	39,500	39,500
	$ 489,021	$ 594,500

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
June 30, 1984

8. RESIDENCE AND PERSONAL PROPERTY (AT COST)

Personal residence	$1,460,691
Escrow deposit – MidAmerica Federal Savings & Loan	6,647
Automobiles	36,061
Household furniture	88,731
Antiques	47,769
Jewelry, fur and fine arts	69,076
	$1,708,975

9. NOTES PAYABLE

Bank of Commerce	$ 650,000
Citicorp (USA), Inc.	1,600,000
First National Bank & Trust Co.	900,000
PBR, Ltd.	102,000
Sunbelt Bank & Trust	1
Union National Bank	150,000
United Bank	450,000
Florence Woodcock	5,628
Western National Bank	280,000
	$4,137,629

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
June 30, 1984

10. LONG-TERM DEBT

	Current Portion	Noncurrent Portion	Total
John H. Williams	$ 62,150	$ –	$ 62,150
MidAmerica Federal Savings & Loan	2,625	554,199	556,824
C.H. March, Jr.	66,000	66,000	132,000
	$130,775	$620,199	$750,974

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Market Value Balance Sheet
September 30, 1984

ASSETS

CURRENT ASSETS:	
Cash (Note 1)	$ 129,897
Marketable securities (Note 2)*	1,280,537
Other securities (Note 3)*	1,416,272
Notes receivable (Note 4)	7,001,462
Accounts receivable (Note 5)	1,079
Total current assets	9,018,572
INVESTMENTS:	
Equities in partnerships, joint ventures and oil properties (Note 6)*	2,251,000
Real estate (Note 7)*	635,000
	2,886,000
OTHER ASSETS:	
Residence and personal property (Note 8)	1,718,859
Deposits	222
Memberships	11,463
Cash surrender value of life insurance	26,867
Office furniture and fixtures	12,259
	1,769,670
	$14,484,917

LIABILITIES AND NET WORTH

CURRENT LIABILITIES:	
Notes payable (Note 9)	$ 4,644,628
Accounts payable	5,000
Current portion of long-term debt (Note 10)	130,853
Total current liabilities	4,780,481
LONG-TERM DEBT (Note 10)	619,493
NET WORTH	9,084,943
	$14,484,917

* Marketable securities and certain investments have been adjusted to reflect fair market value on September 30, 1984. All other assets are reflected at cost or other tax basis.

/s/ JOHN H. WILLIAMS, JR.

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
As of September 30, 1984

1. CASH

Bank of Oklahoma – checking	$ 9,857
Bank of Commerce – checking	22,144
Commercial Bank & Trust Co. – checking	3,068
First National Bank & Trust Co. – checking	13,567
MidAmerica Fund – checking	2,910
Sunbelt Bank and Trust – checking	47,461
Union National Bank – checking	674
United Bank – checking	7,649
Utica National Bank & Trust Co. – checking	644
Village South National Bank	10,271
Western National Bank – checking	3,505
Woodland Bank – checking	869
Bank of Oklahoma – savings	5,994
Utica National Bank & Trust – savings	1,284
	$ 129,897

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
As of September 30, 1984

	Shares, Units or Par Value	Cost	Market Value
2. MARKETABLE SECURITIES INVESTMENT STOCKS AND BONDS:			
Convertible Yield Securities, Inc.	1,423.279	$17,715	$16,280
Cooper Laboratories	1,035	927	19,010
CooperVision, Inc.	2,000	2,200	38,750
Mass Merchandisers, Inc.	106	3,710	1,200
The Williams Companies	9,290	10,516	281,020
		35,068	356,270
BEAR STEARNS & CO.:			
American Physicians Service Group, Inc.	1,000	6,750	7,000
Quest Medical, Inc.	1,000	9,075	4,500
		15,825	11,500
A. G. EDWARDS & SONS, INC.:			
Debit balance		897	897
GOLDMAN, SACHS & CO.:			
Debit balance		908	908
E. F. HUTTON & CO., INC.:			
Stocks			
Sunrise Medical, Inc.	1,000	13,212	8,000
The Williams Companies	3,000	86,093	90,750
		99,305	98,750
Options			
Put/ASA Limited Pr50 Nov.	6	1,741	600
Put/ASA Limited Pr45 Nov.	5	580	100
Call/Comp Tech Pr100 Dec.	4	1,656	1,400
Call/WMB 30 November	30	(6,175)	(4,500)
		(2,198)	(2,200)
Credit balance		(42,353)	(42,300)
		54,754	54,100

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
As of September 30, 1984

	Shares, Units or Par Value	Cost	Market Value
2. MARKETABLE SECURITIES (Cont.)			
MERRILL LYNCH:			
Stocks			
The Williams Companies	15,000	$ 17,425	$453,750
Options			
Call/WMB 30 November	70	(6,215)	(10,500)
Call/WMB 30 February	50	(6,847)	(13,430)
Credit balance		(227,347)	(227,340)
		(13,062)	(23,930)
		(217,356)	(217,350)
		(212,993)	(212,450)
ROTAN MOSLE, INC.:			
Stocks			
Texas Air Corp.	1,000	10,304	7,120
The Williams Companies	25,300	467,400	765,320
		477,704	772,450
Options			
Call/WMB 30 November	140	(12,514)	(21,000)
Call/WMB 30 February	120	(14,227)	(32,250)
Call/WMB 30 May	20	(3,843)	(8,000)
		(30,584)	(61,250)
Credit balance		(379,892)	(379,890)
		67,228	331,300
L. F. ROTHSCHILD, UNTERBERG, TOWBIN:			
Debit balance		11	11

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
As of September 30, 1984

	Shares, Units or Par Value	Cost	Market Value
2. MARKETABLE SECURITIES (Cont.)			
SOUTHWEST SECURITIES:			
Stocks			
BancOklahoma Corp. ...	800	$ 8,750	$17,200
Comcoa, Inc. Units 2 Com & 1 Wt.	1,000	5,000	2,120
EDP Systems, Inc.	5,000	10,000	8,120
MCI Communications Corp.	500	7,569	3,750
National Royalty Corp. ..	10,000	20,000	2,500
Spectra-Physics, Inc.	100	1,475	2,460
Tectel, Inc. Units 2 Com & 1 Wt.	1,000	5,000	1,500
The Williams Companies .	23,500	83,863	710,875
The Williams Companies .	1,000	(22,577)	(30,250)
		119,080	718,280
Options			
Call/WMB 30 November	85	(8,406)	(12,750)
Call/WMB 30 February ..	120	(16,357)	(32,250)
Call/WMB 30 May	20	(3,829)	(8,000)
		(28,592)	(53,000)
Credit balance		(352,233)	(352,233)
		(261,745)	313,050
		$(300,047)	$1,280,530

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
As of September 30, 1984

	Shares, Units or Par Value	Cost	Market Value
3. OTHER SECURITIES			
INVESTMENT STOCKS AND BONDS:			
American Magnetics, Inc.	4,550,000	$ 117,000	$ 10,000
American Magnetics, Inc. Preferred	392,000	392,000	392,000
Bed Check Corp.	5	–	100
Buffalo Pictures of America, Inc.	902.527	–	–
Earth Salt Comp.	5	500	–
Endex, Inc.	59,698	298,490	10,000
Endex, Inc. cu. 10%-1987	200,000	200,000	200,000
The Fairson Comp.	600	39,811	1,000
Harbour Group, Inc.	600	38,811	1,000
The Horter Comp.	1,500	1,500	1,500
Oil Originals, Inc.	23,000	1,000	1,000
Optronics, Inc.	12,043	198,729	391,398
Optronics, Inc. cv. 10.5%-1984	26,000	26,000	26,000
Optronics, Inc. cv. 10.5%-1985	35,000	35,000	35,000
Optronics, Inc. cv. 14%-1985	70,000	70,000	70,000
Optronics, Inc. Preferred	114	114,000	114,000
Plateau Electronics	32	20,000	1,000
Riverside Telephone Company	10,000	10,000	10,000
Skyfield Productions-Class A	100	5,000	5,000
Skyfield Productions-Class B	230	2,674	2,674
Wabash Valley Fair Association, Inc. 2nd Mortgage Bond, 7.50% – 3-1-80	1,000	1,000	600
		$1,532,879	$1,416,272

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
As of September 30, 1984

4. NOTES RECEIVABLE

American Magnetics	$ 150,000
Ann Bein	$ 11,550
Bridges for Peace	4,959
Earth Salt Company	1,500
Endex, Inc.	1,207,258
The Fairson Company	105,500
Metro Christian Academy	2,849
Oil Capitol, Ltd.	225,456
Oil Originals, Inc.	165,100
Duncan M. Payne	4,270
Plateau Electronics	2,057,500
Riverside Telephone Company	20,000
Skyfield Productions, Inc.	3,003,520
Venice Property	17,000
Henry Weinstein	25,000
	$7,001,462

5. ACCOUNTS RECEIVABLE

The HIM Company	$ 350
Optronics, Inc.	572
U.S. Operating, Inc.	157
	$ 1,079

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
As of September 30, 1984

6. EQUITIES IN PARTNERSHIPS, JOINT VENTURES AND OIL PROPERTIES

	Cost	Market Value
The Chesnut Company	$ (579,976)	$ 100,000
Elwood Investments Company	(168,469)	35,000
H & A Partners, Ltd.	(9,900)	30,000
The HIM Company	(152,948)	280,000
The Kensington Company, Ltd.	(235,342)	1,400,000
The Lyndon Company	54,000	54,000
Renovation Associates, Ltd.	7,906	200,000
Venice Property Investment	11,000	60,000
WILMAC Company	286,224	20,000
Oil Properties (leasehold costs & tangible equipment)	6,196	72,000
	$ (781,309)	$2,251,000

7. REAL ESTATE

Linville, N.C. – 1.1 acres	$ 16,348	$ 105,000
Lake Property – Oakwood Point	433,173	480,000
Terre Haute, Indiana – 20.20 acres	39,500	50,000
	$ 489,021	$ 635,000

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
As of September 30, 1984

8. RESIDENCE AND PERSONAL PROPERTY (AT COST)

Personal residence	$1,468,372
Escrow deposit – MidAmerica Federal Savings & Loan	8,850
Automobiles	36,061
Household furniture	88,731
Antiques	47,769
Jewelry, fur and fine arts	69,076
	$1,718,859

9. NOTES PAYABLE

Bank of Commerce	$ 650,000
Citicorp (USA), Inc.	1,600,000
First National Bank & Trust Co.	820,000
PBR, Ltd.	109,000
Sunbelt Bank & Trust	300,000
Union National Bank	150,000
United Bank	530,000
Village South National Bank	200,000
Florence Woodcock	5,628
Western National Bank	280,000
	$4,644,628

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
As of September 30, 1984

10. LONG-TERM DEBT

	Current Portion	Noncurrent Portion	Total
John H. Williams	$ 62,150	$ –	$ 62,150
MidAmerica Federal Savings & Loan	2,703	553,493	556,196
C.H. March, Jr.	66,000	66,000	132,000
	$130,853	$619,493	$750,346

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Market Value Balance Sheet
December 31, 1984

ASSETS

CURRENT ASSETS:	
Cash (Note 1)	$ 126,212
Marketable securities (Note 2)*	1,134,092
Other securities (Note 3)*	1,558,704
Notes receivable (Note 4)	6,954,852
Accounts receivable (Note 5)	922
Total current assets	9,772,782
INVESTMENTS:	
Equities in partnerships, joint ventures and oil properties (Note 6)*	1,484,502
Real estate (Note 7)*	715,000
	2,199,502
OTHER ASSETS:	
Residence and personal property (Note 8)	1,715,683
Deposits	222
Memberships	11,463
Cash surrender value of life insurance	26,867
Office furniture and fixtures	10,420
	1,764,655
	$13,736,939

LIABILITIES AND NET WORTH

CURRENT LIABILITIES:	
Notes payable (Note 9)	$ 4,749,931
Accounts payable	5,000
Current portion of long-term debt (Note 10)	130,934
Total current liabilities	4,885,865
LONG-TERM DEBT (Note 10)	892,957
NET WORTH	7,958,117
	$13,736,939

* Marketable securities and certain investments have been adjusted to reflect fair market value on December 31, 1984. All other assets are reflected at cost or other tax basis.

/s/ JOHN H. WILLIAMS, JR.

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
As of December 31, 1984

1. CASH

Bank of Oklahoma – checking	$ 51,665
Bank of Commerce – checking	5,053
Commercial Bank & Trust Co. – checking	1,528
First National Bank & Trust Co. – checking	37,384
MidAmerica Fund – checking	3,630
Sunbelt Bank and Trust – checking	4,561
Union National Bank – checking	674
United Bank – checking	2,610
Utica National Bank & Trust Co. – checking	5,645
Village South National Bank – checking	1,134
Western National Bank – checking	1,838
Woodland Bank – checking	846
Bank of Oklahoma – savings	6,165
Utica National Bank & Trust – savings	1,318
Deposits in transit	161
	$ 124,212

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
As of December 31, 1984

	Shares, Units or Par Value	Cost	Market Value
2. MARKETABLE SECURITIES INVESTMENT STOCKS AND BONDS:			
Convertible Yield Securities, Inc.	1,443.554	$17,943	$16,283
Cooper Laboratories	1,035	927	13,714
CooperVision, Inc.	2,000	2,200	33,000
Mass Merchandisers, Inc.	106	3,710	1,179
The Williams Companies	7,290	8,193	216,878
		32,973	281,054
BEAR STEARNS & CO.:			
American Physicians Service Group, Inc.	1,000	6,750	6,000
Quest Medical, Inc.	1,000	9,075	3,125
		15,825	9,125
GOLDMAN, SACHS & CO.:			
Debit balance		928	928
E. F. HUTTON & CO., INC.:			
Stocks			
Sunrise Medical, Inc.	1,000	13,212	6,500
The Williams Companies	3,000	86,093	89,250
		99,306	95,750
Options			
Call/WMB 35 May	30	(3,184)	(1,125)
Credit balance		(43,785)	(43,785)
		52,337	50,840

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
As of December 31, 1984

	Shares, Units or Par Value	Cost	Market Value
2. MARKETABLE SECURITIES (Cont.)			
MERRILL LYNCH:			
Stocks			
The Williams Companies	15,000	$ 17,425	$446,250
Options			
Call/WMB 30 February	120	(18,733)	(13,500)
Call/WMB 35 May	10	(571)	(375)
		(19,304)	(13,875)
Credit balance		(227,455)	(227,455)
		(229,334)	204,920
ROTAN MOSLE, INC.:			
Stocks			
Texas Air Corp.	1,000	10,304	9,125
The Williams Companies	25,300	467,400	752,675
		477,704	761,800
Options			
Call/WMB 30 February	190	(27,995)	(21,375)
Call/WMB 30 May	42	(9,115)	(7,350)
Call/WMB 35 May	38	(2,365)	(1,425)
		(39,475)	(30,150)
Credit balance		(422,064)	(422,064)
		16,165	309,580

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
As of December 31, 1984

	Shares, Units or Par Value	Cost	Market Value
2. MARKETABLE SECURITIES (Cont.)			
SOUTHWEST SECURITIES:			
Stocks			
BancOklahoma Corp. ...	800	$ 8,750	$14,300
Comcoa, Inc. Units 2 Com & 1 Wt.	1,000	5,000	2,500
EDP Systems, Inc.	5,000	10,000	8,125
MCI Communications Corp.	500	7,569	3,750
Spectra-Physics, Inc.	100	1,475	2,225
Tectel, Inc. Units 2 Com & 1 Wt.	1,000	5,000	1,250
The Williams Companies .	23,500	83,863	699,125
The Williams Companies .	(1,900)	(22,577)	(29,750)
		99,080	701,525
Options			
Call/WMB 30 February ..	180	(22,448)	(20,250)
Call/WMB 30 May	20	(3,829)	(3,500)
Call/WMB 35 May	10	(398)	(375)
		(26,675)	(24,125)
Credit balance		(399,761)	(399,763)
		(327,356)	277,639
		$(438,462)	$1,134,090

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
As of December 31, 1984

	Shares, Units or Par Value	Cost	Market Value
3. OTHER SECURITIES			
INVESTMENT STOCKS AND BONDS:			
American Magnetics, Inc.	4,550,000	$ 117,000	$ 117,000
American Magnetics, Inc. Preferred	392,000	392,000	392,000
Bed Check Corp.	5	—	—
Buffalo Pictures of America, Inc.	902.527	—	—
Earth Salt Comp.	5	500	—
Endex, Inc.	59,698	298,490	10,000
Endex, Inc. cu. 10%-1987	200,000	200,000	200,000
The Fairson Comp.	600	39,811	100
Harbour Group, Inc.	175	175	145,000
The Horter Comp.	1,500	1,500	1,500
Oil Originals, Inc.	23,000	1,000	1,000
Optronics, Inc. cv. 10.5%-1985	35,000	35,000	35,000
Optronics, Inc. cv. 14%-1985	70,000	70,000	70,000
Optronics, Inc. cv. 13% – 1990	391,333	391,333	391,333
Optronics, Inc. cv. 20% – 1989	114,000	114,000	114,000
Petromark Resources Company	87.5	28,765	62,400
Plateau Electronics	32	20,000	1,000
Riverside Telephone Company	500	10,000	10,000
Skyfield Productions-Class A	100	5,000	5,000
Skyfield Productions-Class B	230	2,674	2,600
Wabash Valley Fair Association, Inc. 2nd Mortgage Bond, 7.50% – 3-1-80	1,000	1,000	600
		$1,728,248	$1,558,700

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
As of December 31, 1984

4. NOTES RECEIVABLE

American Magnetics	$ 150,000
Ann Bein	$ 11,550
Bridges for Peace	4,959
Endex, Inc.	1,287,258
The Fairson Company	177,400
Harbour Group, Inc.	100,000
Magnetic Media, Inc.	52,481
Metro Christian Academy	2,849
Oil Capitol, Ltd.	102,456
Oil Originals, Inc.	184,500
Duncan M. Payne	4,270
Plateau Electronics	1,659,500
Skyfield Productions, Inc.	3,120,520
Triangle Development Company	29,472
Venice Property Investments	17,000
Henry Weinstein	25,000
Robert W. Whitmore	25,637
	$6,954,852

5. ACCOUNTS RECEIVABLE

The HIM Company	$ 350
Optronics, Inc.	572
	$ 922

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
As of December 31, 1984

6. EQUITIES IN PARTNERSHIPS, JOINT VENTURES AND OIL PROPERTIES

	Cost	Market Value
Elwood Investments Company	(848,587)	(691,286)
H & A Partners, Ltd.	(9,900)	30,000
The HIM Company	(193,701)	202,793
The Kensington Company, Ltd.	(1,412,624)	400,000
The Lyndon Company	–	10,000
Renovation Associates, Ltd.	8,074	300,000
Riverside Company	(386,817)	1,144,000
Taabour Management Company	18,907	13,500
Venice Property Investment	11,000	15,000
WILMAC Company	284,274	5,000
Oil Properties (leasehold costs & tangible equipment)	39,714	55,495
	$(2,489,660)	$1,484,502

7. REAL ESTATE

Linville, N.C. – 1.1 acres	$ 16,349	$ 115,000
Lake Property – Oakwood Point	433,173	480,000
Terre Haute, Indiana – 20.20 acres	39,500	45,000
Tulsa, Okla. – 21st & Lynn Lane – 15 acres	69,012	75,000
	$ 558,034	$ 715,000

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
As of December 31, 1984

8. RESIDENCE AND PERSONAL PROPERTY (AT COST)

Personal residence	$1,471,620
Escrow deposit – MidAmerica Federal Savings & Loan	1,849
Automobiles	36,061
Household furniture	88,731
Antiques	48,346
Jewelry, fur and fine arts	69,076
	$1,715,683

9. NOTES PAYABLE

Citicorp (USA), Inc.	1,600,000
First National Bank & Trust Co.	885,000
PBR, Ltd.	9,248
Sunbelt Bank & Trust	300,000
Tabour Management Company	5,683
Tulsa National Bank	350,000
Union National Bank	150,000
United Bank	700,000
Utica National Bank	250,000
Village South National Bank	200,000
Western National Bank	300,000
	$4,749,931

JOHN H. WILLIAMS, JR.
TULSA, OKLAHOMA

Notes to Market Value Balance Sheet
As of December 31, 1984

10. LONG-TERM DEBT

	Current Portion	Noncurrent Portion	Total
Commercial National Bank	$ –	$268,000	$268,000
John H. Williams	62,150	–	62,150
MidAmerica Federal Savings & Loan	2,784	552,766	555,550
C.H. March, Jr.	66,000	66,000	132,000
Florence Woodcock	–	6,191	6,191
	$130,934	$892,957	$1,023,891

JOHN H. WILLIAMS, JR.

Statement of Income and Expense
For Year Ending December 31, 1983

INCOME:	
Salary	$ 48,067
Interest	471,682
Dividends	135,672
Oil & Gas	26,205
Capital Gains	1,296,355
Rental Income	22,200
Partnerships	(77,544)
Other	4,077
Total Income	$1,926,714
EXPENSES:	
Taxes	$ 135,264
Interest	1,041,484
Insurance	4,679
Business Expense	81,629
Contributions	140,290
Total Expense	$1,403,346
Net Income	$ 523,368

JOHN H. WILLIAMS, JR.

Statement of Income and Expense
For Year Ending December 31, 1984

INCOME:	
Salary	$ 31,250
Interest	199,176
Dividends	139,988
Oil & Gas	16,123
Capital Gains	2,681,356
Partnerships*	(1,390,078)
Other	47,631
Total Income	$1,725,446
EXPENSES:	
Taxes	$ 77,103
Interest	1,228,456
Miscellaneous accounting, legal and business expense	45,555
Contributions	34,943
Total Expense	$1,386,057
Net Income	$ 339,389

* Note: This loss figure includes tax losses generated within various Partnerships; the reported loss has no direct cash flow impact on JHWJr.

JOHN H. WILLIAMS, JR.

Projected Statement of Income and Expense
For Year Ending December 31, 1984

INCOME:	
Salary	$ 31,250
Interest	700,000
Dividends	140,287
Oil & Gas	14,200
Capital Gains	2,550,000
Partnerships*	(1,378,174)
Other	43,750
Total Income	$2,101,313
EXPENSES:	
Taxes, net	$ 95,000
Interest	1,167,000
Miscellaneous accounting, legal and business expense	48,900
Contributions	80,000
Total Expense	$1,390,900
Net Income	$ 710,413

* Note: This loss figure includes tax losses generated within various Partnerships; the reported loss has no direct cash flow impact on JHWJr.

/s/ JOHN H. WILLIAMS, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 88-CR-52-E

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JOHN H. WILLIAMS, JR., DEFENDANT

DEFENDANT'S MOTION AND BRIEF TO COMPEL DISCLOSURE OF EXCULPATORY EVIDENCE

Defendant John H. Williams, Jr., through counsel, respectfully moves the Court to direct the Government to furnish and make available for inspection and or copying as soon as possible any evidence, material, or information within the possession, custody, or control of the Government, or that by the exercise of reasonable diligence may be obtained by the Government, that is favorable to or exculpates in any way the Defendant or tends to establish a defense in whole or in part to the allegations in the indictment or that may help the Defendant avoid conviction or mitigate punishment.

The Defendant's request includes, but is not limited to, the following:

(1) Any evidence, material, or information that would tend to impeach the credibility of any person whom the Government intends to call as a witness, including but not limited to:

(a) Any record of the witness's arrest or conviction maintained or prepared by the Federal Bureau of Investigation or by any state law enforcement agency.

(b) Any facts or allegations concerning criminal or other misconduct of the witness that is not reflected on his criminal record and disclosure of any pending criminal charge or investigation against him or any business entity with which he is connected.

(c) Any material relating to the witness's mental or psychiatric history that tends to impair or reflect adversely on his reliability as a witness.

(d) Any statements made, written or recorded by or of the witness referring or relating to any of the above mentioned matters.

(e) Any information that tends to contradict the testimony that the Government anticipates will be given by any of its witnesses, including but not limited to expert opinion. *E.g., Marzeno v. Gengler,* 574 F.2d 730 (3rd Cir. 1978).

(f) Any indication by any person that the loans and extensions at issue were made to enhance the bank's position, vis-a-vis The Williams Companies (or some associated person or entity) and not because of a material misrepresentation by the Defendant.

(2) Any and all statements, testimony, memoranda, interviews, documents or summaries, relating to this case, or any portion thereof, by any person that contradict, in whole or in part, any statement (by that person or any other person) that the Government intends to use or rely on in any manner in connection with the trial of this case.

(3) All evidence that tends to minimize or negate the probative effect of the Government's evidence of Defendant's participation in the allegations set forth in the indictment.

(4) Any evidence, statement, or information in the possession of the Government describing or relating to the conduct of the Defendant which in any way refutes or is inconsistent with his participation in the alleged activities.

Brady v. Maryland, 373 U.S. 83 (1963).

(5) Any evidence, statement, or information that tends to minimize or negate any of the Government's evidence against the Defendant or which refutes or is inconsistent with any evidence, statement, information, or opinion of an expert that the Government intends to use at trial.

(6) Any evidence, statement or information tending to establish the good business prospects for the companies which are the subject of the notes receivable.

(7) Any evidence, statement or information tending to establish the good character of the Defendant.

(8) Any evidence, statement or information tending to establish the propriety of the interest income.

(9) Any evidence, statement or information tending to justify the Defendant's valuation of the notes receivable.

(10) Any evidence, statement or information tending to enhance the value of the companies which are the subject of the notes receivable.

(11) Any evidence, statement or information tending to prove that correct accounting and/or tax procedures were employed by the Defendant in disclosing his income, expenses, assets and liabilities to the alleged victim banks.

(12) Any evidence, statement or information tending to ascribe value in the notes receivable from the following persons or entities:

Ann Bein
Bridges for Peace
Earth Salt Company
Endex, Inc.
The Fairson Company
Fletcher Gregory
Metro Christiafn kAcademy
Oil Capitol, Ltd.
Oil Originals, Inc.

Duncan M. Payne
Plateau Electronics
Skyfield Productions
Venice Property
Henry Weinstein

(13) Any evidence, statement or information tending to prove the income and expenses of the Defendant for the year ending 12/31/84 were true and accurate.

(14) Any evidence, statement or information tending to prove that the Defendant did not willfully fail to provide Village South National Bank with financial information concerning Plateau Electronics.

(15) Any evidence, statement or information tending to prove that Plateau Electronics had patents and royalties worth $4 million to $7 million.

(16) Any evidence, statement or information tending to prove that the Defendant did not willfully furnish Tulsa National Bank false projections of interest income.

(17) Any evidence, statement or information tending to prove the Defendant did not falsely list interest income in the amounts alleged in the indictment in Counts 5, 6 and 7.

(18) Any evidence, statement or information tending to prove that the numbers listed by the Defendant in his financial statements were not false.

Additionally, the Defendant requests that the Court order the Government to produce for Court inspection any evidence or information about which it has had any doubt in determing the exculpatory nature. *United States v. Bocra,* 623 F.2d 281 (3rd Cir. 1980); *United States v. Gleason,* 265 F. Supp. 880 (S.D. N,Y, 1967). The Defendant further requests the Court to order the Government to reveal to the Defendants any exculpatory evidence not now in its possession discovered after the filing of this

motion. *United States v. Sheehan,* 442 F. Supp.1003, 1006-07 (D. Mass. 1977).

The Defendant's right to the requested materials is unquestioned. *Brady v. Maryland, supra.* Furthermore, to afford the defense the opportunity to use fully these materials, the Court should require their production before trial. *E.g., Grant v. Alldredge,* 498 F.2d 376 (2nd Cir. 1974); *United States v. Kaplan,* 554 F.2d 577 (3rd Cir. 1977).

Respectfully submitted,

SNEED, LANG, ADAMS,
HAMILTON & BARNETT

By /s/ James C. Lang

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Attorneys for Defendant
John H. Williams, Jr.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

Case No. 88-CR-52-E

UNITED STATES OF AMERICA, PLAINTIFF

VS.

JOHN H. WILLIAMS, JR., DEFENDANT

ORDER

Based on the motion filed by the plaintiff in the above-styled and numbered case styled Motion to Disclose Grand Jury Transcripts to the Defendant, the Court hereby orders that the government may disclose grand jury testimony given "In the Matter of John H. Williams, Jr." The government may disclose any and all testimony and evidence presented to the Grand Jury for the Northern District of Oklahoma which would be exculpatory in nature and fall within the mandates of *Brady v. Maryland,* 373 U.S. 83 (1963).

It is further the order of the Court that the government may disclose to the defendant edited transcripts of the grand jury testimony, and may file with the Court duplicate copies of the edited grand jury transcripts along with the complete transcripts of the testimony given by the witnesses, all under seal.

It is further the order of the Court that the defendant, and his counsel, may utilize the grand jury testimony in preparation for trial, and in presentation of evidence, and may disclose the grand jury testimony as necessary to perform those functions. However, neither the defendant, nor defendant's counsel, shall reveal the testimony given before the grand jury for any other purposes.

It is so ordered by the Court on this 13th day of September, 1988.

/s/ James O. Ellison
JAMES O. ELLISON
United States District Judge

In the Supreme Court of the United States

No. 90-1972

UNITED STATES, PETITIONER

v.

JOHN H. WILLIAMS, JR.

ORDER ALLOWING CERTIORARI,
Filed October 15, 1991

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

October 15, 1991

U.S. GOVERNMENT PRINTING OFFICE: 1991 — 262-203/47,063

Supreme Court, U.S.
FILED
NOV 29 1991
OFFICE OF THE CLERK

No. 90-1972

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN H. WILLIAMS, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

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Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
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QUESTION PRESENTED

Whether an indictment may be dismissed because the government failed to present exculpatory evidence to the grand jury.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional provision involved	2
Statement	2
Summary of argument	7
Argument:	
The court of appeals erred in dismissing the indictment on the ground that the government failed to present exculpatory evidence to the grand jury	11
A. An indictment that is valid on its face is not subject to challenge because of alleged inadequacies in the evidentiary presentation to the grand jury	11
B. An indictment should not be dismissed on the ground that the prosecutor did not present exculpatory evidence to the grand jury	17
1. A rule requiring the prosecutor to present exculpatory evidence is incompatible with the grand jury's functions	17
2. The burdens of the proposed rule would significantly outweigh any possible benefits	23
C. The indictment in this case should not have been dismissed	28
Conclusion	31

TABLE OF AUTHORITIES

Cases:

Bank of Nova Scotia v. *United States*, 487 U.S. 250 (1988)	5, 15, 20, 22
Brady v. *Maryland*, 373 U.S. 83 (1963)	25
Branzburg v. *Hayes*, 408 U.S. 665 (1972)	11
Costello v. *United States*, 350 U.S. 359 (1956)	12, 14, 15, 20
Douglas Oil Co. v. *Petrol Stops Northwest*, 441 U.S. 211 (1979)	13

Cases—Continued: Page

Duke v. *United States*, 90 F.2d 840 (4th Cir.), cert. denied, 302 U.S. 775 (1937) 12
Ewing v. *Mytinger & Casselberry*, 339 U.S. 594 (1950) 16
Franks v. *Delaware*, 438 U.S. 154 (1978) 22
Groban, In re, 352 U.S. 330 (1957) 13
Hale v. *Henkel*, 201 U.S. 43 (1906) 11, 21
Lawn v. *United States*, 355 U.S. 339 (1958) 12, 15
Midland Asphalt Corp. v. *United States*, 489 U.S. 794 (1989) 22
United States v. *Adamo*, 742 F.2d 927 (6th Cir. 1984), cert. denied, 469 U.S. 1193 (1985) 19
United States v. *Agurs*, 427 U.S. 97 (1976) 25
United States v. *Bolles*, 209 F. 682 (W.D. Mo. 1913) 13
United States v. *Blue*, 384 U.S. 251 (1966) 12
United States v. *Braniff Airways, Inc.*, 428 F. Supp. 579 (W.D. Tex. 1977) 24
United States v. *Brown*, 943 F.2d 1246 (10th Cir. 1991) 26
United States v. *Calandra*, 414 U.S. 338 (1974) 11, 12, 16, 17, 18, 25
United States v. *Chanen*, 549 F.2d 1306 (9th Cir. 1977), cert. denied, 434 U.S. 825 (1977) 22
United States v. *Ciambrone*, 601 F.2d 616 (2d Cir. 1979) 19
United States v. *DeMarco*, 401 F. Supp. 505 (C.D. Cal. 1975), aff'd, 550 F.2d 1224 (9th Cir.), cert. denied, 434 U.S. 827 (1977) 24-25
United States v. *Dionisio*, 410 U.S. 1 (1973) 12, 14
United States v. *Dyer*, 750 F. Supp. 1278 (E.D. Va. 1990) 24
United States, Ex parte, 287 U.S. 241 (1932) 13, 15
United States v. *R. Enterprises, Inc.*, 111 S. Ct. 722 (1991) 11, 14, 21
United States ex rel. McCann v. *Thompson*, 144 F.2d 604 (2d Cir.), cert. denied, 323 U.S. 790 (1944) 12
United States v. *Flomenhoft*, 714 F.2d 708 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984) 19
United States v. *Fritz*, 852 F.2d 1175 (9th Cir. 1988), cert. denied, 489 U.S. 1027 (1989) 12

Cases—Continued: Page

United States v. *Giovanelli*, 747 F. Supp. 875 (S.D.N.Y. 1989) 24
United States v. *Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979) 24
United States v. *Hawkins*, 765 F.2d 1482 (11th Cir. 1985), cert. denied, 474 U.S. 1103 (1986) 19
United States v. *Johnson*, 319 U.S. 503 (1943) 14
United States v. *Larrazolo*, 869 F.2d 1354 (9th Cir. 1989) 19
United States v. *Law Firm of Zimmerman & Schwartz, P.C.*, 738 F. Supp. 407 (D. Colo. 1990), aff'd *sub nom. United States* v. *Brown*, 943 F.2d 1246 (10th Cir. 1991) 26
United States v. *Mandujano*, 425 U.S. 564 (1976) 21
United States v. *Mechanik*, 475 U.S. 66 (1986) 16, 20, 21
United States v. *Page*, 808 F.2d 723 (10th Cir.), cert. denied, 482 U.S. 918 (1987) 3, 4, 19, 23, 24
United States v. *Payner*, 447 U.S. 727 (1980) 20
United States v. *Phillips Petroleum Co.*, 435 F. Supp. 610 (N.D. Okla. 1977) 24
United States v. *Reid*, 911 F.2d 1456 (10th Cir. 1990), cert. denied, 111 S. Ct. 990 (1991) 24
United States v. *Rivera-Santiago*, 872 F.2d 1073 (1st Cir.), cert. denied, 492 U.S. 910 (1989) 19
United States v. *Thompson*, 251 U.S. 407 (1920) 13
United States v. *Udziela*, 671 F.2d 995 (7th Cir. 1982), cert. denied, 457 U.S. 1135 (1982) 21-22
United States v. *Vincent*, 901 F.2d 97 (8th Cir. 1990) 19
Wood v. *Georgia*, 370 U.S. 375 (1962) 11, 21

Constitution, statutes and rules:

U.S. Const.:
Amend. IV 16
Amend. V 2, 8, 11, 14, 19
Due Process Clause 25
18 U.S.C. 1014 3
Fed. R. Crim. P.:
Rule 6(a) 13
Rule 6(b) 13

Rules—Continued:	Page
Rule 6(e)	13
Rule 6(f)	13
Fed. R. Evid. Rule 1101(d)(2)	12
Miscellaneous:	
4 W. Blackstone, *Commentaries*	13
Note, *Grand Jury: A Prosecutor Need Not Present Exculpatory Evidence*, 38 Wash. & Lee L. Rev. 110 (1981)	22
United States Attorneys' Manual (1990)	28

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1972

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN H. WILLIAMS, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 899 F.2d 898. The orders of the district court (Pet. App. 16a-18a, 19a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1990. Petitions for rehearing were denied on April 22, 1991. Pet. App. 28a. The petition for a writ of certiorari was filed on June 24, 1991, and was granted on October 15, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *.

STATEMENT

1. Between September 1984 and November 1985, respondent obtained loans and renewals of loans from several banks in Tulsa, Oklahoma. In applying for the loans, respondent provided the banks with two types of financial statements. One of the statements, called a "Market Value Balance Sheet," included a list of respondent's "current assets." J.A. 14-43. In financial statements, current assets are generally understood to be cash or assets that can be converted to cash within one year. Pet. App. 2a. Respondent's list of current assets contained a group of "notes receivable," J.A. 14, 24, 34; included in that group were notes totaling between $5.5 and $6.3 million reflecting loans that respondent had made to three venture capital companies—Endex, Inc., Plateau Electronics, and Skyfield Productions, Inc. J.A. 20, 30, 40. Although respondent's balance sheet did not disclose the fact, each of the venture companies was relatively new and had a negative net worth at the time the statements were submitted to the banks; the notes were therefore uncollectible in the short term. Pet. App. 2a.

The second financial document used by respondent was a "Statement of Projected Income and Expense." J.A. 44-46. A major source of respondent's projected income reflected in that statement was interest; that category included interest due on the venture capital notes described above. Because of the precarious

financial condition of the venture companies, no interest could be paid on those notes apart from the funds generated from respondent's own loans to the companies. The financial statements respondent submitted to the banks, however, failed to indicate that the interest income listed on the "Statement of Projected Income and Expense" did not derive from an independent outside source, but came from the funds that respondent himself had invested in the venture companies. Pet. App. 2a-3a.

2. On May 4, 1988, a grand jury sitting in the United States District Court for the Northern District of Oklahoma returned a seven-count indictment against respondent. J.A. 9-13. The indictment charged respondent with knowingly making false statements to federally insured banks for the purpose of influencing the banks to extend loans, in violation of 18 U.S.C. 1014. The allegedly false oral and written statements related to respondent's overvaluation of the notes receivable in his statement of current assets, and the overvaluation of the interest income in his projected income statement. Pet. App. 3a.

After receiving portions of the grand jury transcript in discovery, J.A. 52-53, respondent moved to dismiss the indictment on the ground that the government had failed to present "substantial exculpatory evidence" to the grand jury, as required by *United States* v. *Page*, 808 F.2d 723, 728 (10th Cir.), cert. denied, 482 U.S. 918 (1987). Respondent claimed that his ledgers, tax returns, and other financial records were in the government's possession but had improperly been withheld from the grand jury. Respondent's theory was that those documents were exculpatory because they revealed that he and his accountants had consistently treated the notes receivable and interest income in the same manner as they had

been treated in the presentations to the banks. Respondent also asserted that the government had in its possession and should have presented to the grand jury a five-volume transcript of his deposition, given in connection with his bankruptcy proceedings, in which he explained his methods of accounting and financial reporting in a fashion that he claimed exonerated him. Pet. App. 3a-4a.

In response, the government argued that it had complied with any duty it had to present potentially exculpatory evidence to the grand jury. In particular, the government argued that it had introduced the relevant financial records and account documents pertaining to the charged offenses, and that it had called witnesses before the grand jury who had testified about respondent's confidence in his venture capital investments. See Gov't Response to Defendant's Motion to Dismiss (filed Oct. 3, 1988), at 3-4.

The district court initially denied respondent's motion, concluding that "there has been no substantial exclusion of exculpatory evidence from the purview of the Grand Jury." Pet. App. 17a. Although stating that certain "potentially" exculpatory evidence had not been presented to the grand jury, the court found that the information at issue did not rise to the threshold set by *Page* because a prosecutor is not obligated "to 'ferret out and present every bit of potentially exculpatory evidence.' " *Ibid.*, citing *Page*, 808 F.2d at 728.

On reconsideration, however, the district court reversed itself and dismissed the indictment. The court stated that two categories of evidence in the government's possession constituted "substantial exculpatory evidence" that had been withheld from the grand jury: (1) the bankruptcy deposition, in which respondent explained his financial accounting methods,

and (2) various financial statements, tax records, accounting ledgers, and other documents prepared by respondent and his accountants. Pet. App. 23a, 25a. As the court saw it, that evidence helped explain the alleged false statements on which the charges were based, and it was "substantially exculpatory," because it was germane to respondent's "intent to make materially false statements upon which the banks would rely." *Id.* at 24a.

The court then applied this Court's decision in *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256 (1988), under which an indictment may be dismissed for a violation of the rules governing grand jury proceedings only if " 'the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." Examining the facts under the *Bank of Nova Scotia* test, the district court concluded that the withheld information "raises reasonable doubt about [respondent's] intent to defraud," such that the grand jury's decision to indict was "gravely suspect." Pet. App. 26a. Accordingly, the court dismissed the indictment without prejudice. *Ibid.*

3. The government took an appeal from the dismissal order, and the court of appeals affirmed. Pet. App. 1a-15a. Citing its decision in *Page*, the court declared that "a prosecutor has the duty to present substantial exculpatory evidence to the grand jury." *Id.* at 5a. The court treated the district court's determination that the government had withheld exculpatory evidence as a finding of fact, and it concluded that the district court's ruling was not clearly erroneous. *Id.* at 4a-5a, 7a-11a.

With respect to the bankruptcy deposition, the court found that although respondent's explanations

of his accounting methods "may seem irrelevant and self-serving under the government's theory of the case, the grand jury must receive any information that is relevant to any reasonable theory it may adopt." Pet. App. 8a. In this case, the court stated, the grand jury could reasonably have accepted a different view of respondent's definition of "current assets" than that offered by the government; if it had, respondent's explanations of his accounting methods "would have been relevant" in tending to establish that he lacked an intent to defraud the banks. *Id.* at 8a-9a.

With respect to respondent's financial records, the court of appeals noted that respondent had consistently reported his income and expenses in the same manner as he had presented them to the banks. The court also observed that the grand jury could have concluded that a "legend" on respondent's financial statements would have put the banks on notice that respondent used a method to account for his current assets that did not conform to generally accepted accounting principles. Pet. App. 9a-10a. In light of those factors, the court concluded that the withheld evidence was "consistent with the possible theory that [respondent] simply did not intend to mislead the banks." *Id.* at 11a. The court of appeals therefore upheld the district court's characterization of the withheld information as exculpatory.[1] *Ibid.*

[1] In addition to arguing that the withheld information was not exculpatory, the government contended that its witnesses had in fact put before the grand jury the substance of the information discussed by the court. The court of appeals declined to decide that issue, however, stating that "the government did not designate the grand jury transcript as a part of the record before us." Pet. App. 11a. On rehearing, the government explained that the grand jury transcript had in fact been designated as part of the record, and that it was only because of an error by the district court clerk that the transcript had not been transmitted to the Tenth Circuit. The government urged the panel to reconsider its holding in light of the transcript. Gov't C.A. Pet. for Rehearing at 4. The panel nevertheless denied rehearing without comment. Pet. App. 28a.

The court of appeals also upheld the district court's determination that the prosecutor's failure to present exculpatory evidence to the grand jury rendered the indictment vulnerable to dismissal under the *Bank of Nova Scotia* standard. The court explained that "the purpose of the grand jury is to render an unbiased, independent, and informed decision based on all relevant evidence"; the "government's theory of the case is not critical." Pet. App. 14a. Reasoning that "[t]he finding of intent to commit a criminal act is a determination the grand jury must make in deciding whether probable cause exists," the court sustained the district court's ruling that "the failure to present evidence relevant to the critical issue of intent rendered the indictment suspect," *ibid.*, and justified dismissal of the indictment without prejudice, *id.* at 14a-15a.

SUMMARY OF ARGUMENT

A. The grand jury is governed by rules significantly different from those that apply to an open, adversarial proceeding such as a criminal trial. The grand jury's function is investigative, not adjudicative. It sits to determine whether there is probable cause to believe that a person should be tried on criminal charges, not to resolve those charges through a trial-type procedure. It works *ex parte*; it is not constrained by formal rules of evidence; and it is not

required to give targets the right to appear, the right to present evidence, or the right to have counsel participate in the proceedings.

In light of its investigative function and independent status, the grand jury has traditionally operated free from judicial review of either the evidence it considers or its decision to return an indictment. Although courts police the grand jury's compliance with the rules and statutes that govern its activities, courts have declined to review the nature or sufficiency of the evidence the grand jury has considered in making its charging decisions. Instead, as this Court has frequently observed, an indictment returned by a legally constituted and unbiased grand jury is sufficient to call for trial of the charge on the merits, without any intercession by a court.

B. A judicially enforceable rule requiring that exculpatory evidence be presented to the grand jury would be incompatible with the traditional role of the grand jury as an independent investigative body whose findings of probable cause are not subject to judicial review. Such a rule erroneously treats the grand jury as if it were a petit jury, convened to conduct a full-blown trial on the merits. The absence of an adversary presentation and the grand jury's limited screening function suggest that the grand jury is not the body that should try defenses to the charges. For courts to administer a rule requiring, in effect, that the prosecutor anticipate and attempt fairly to present the substance of possible defenses would burden the grand jury with exactly the sort of minitrials against which this Court has cautioned. Neither the Fifth Amendment's guarantee of an "indictment of a Grand Jury" nor the supervisory power of the federal courts justifies that level of judicial intrusion in the charging process.

Any marginal benefits from a rule requiring the presentation of exculpatory evidence before the grand jury would be vastly outweighed by the costs such a rule would impose. The task of identifying those cases in which the grand jury would not have indicted if certain evidence had been presented to it would be an exceedingly difficult one, in which the risk of error is high. Even assuming that courts could make that determination accurately, the value to the criminal justice system would be questionable. While the dismissals in a small number of cases might save the time and effort of a trial, courts would spend far more time and effort in processing the great number of pretrial motions to dismiss that the rule would generate, most of which would likely be found meritless. Experience and common sense dictate that there will be very few cases in which a grand jury that was otherwise prepared to indict will refuse to find probable cause upon being apprised of the theory of defense and the allegedly exculpatory evidence that is invoked to support it. Indeed, there is a built-in protection against indictments that are subject to ready rebuttal by defense evidence of which the prosecutor is aware: Prosecutors have every incentive not to seek an indictment where the case has little or no chance of resulting in a conviction when the full record is presented to the petit jury.

The costs of a rule requiring that potentially exculpatory evidence be presented to the grand jury would not be significantly lessened by limiting the duty to "substantial" exculpatory evidence, as the court of appeals purported to do. Such a standard would be extremely difficult for prosecutors to follow or courts to apply. What is more, the court of appeals in this case adopted an extremely liberal standard for

determining when particular evidence is "substantially exculpatory." It adopted the formulation that the grand jury must receive "any information" that is relevant to "any reasonable theory" that the jurors may adopt. Under that standard, prosecutors would routinely be compelled to supplement their grand jury presentations with material submitted by the prospective defendant or with materials that might support some hypothetical theory of defense, simply in order to head off an inevitable challenge to the indictment prior to trial.

In the rare case in which the prosecutor fails to present known exculpatory evidence that likely would have led the grand jury not to indict, the problem can be addressed as a violation of internal guidelines such as those adopted by the Department of Justice. A general rule that imposes substantial costs on the criminal justice system as a whole should not be adopted to deal with those few instances in which the prosecutor has intentionally presented a significantly distorted case to the grand jury.

C. In light of these principles, the court of appeals erred in upholding the dismissal of the indictment in this case. In fact, this case provides a good illustration of the mischief that can flow from the rule that the court of appeals adopted. The investigation in this case was lengthy and complex, and the charged crimes turned on the issue of intent, as to which no single piece of evidence was conclusive. Moreover, the prosecutor introduced evidence that was favorable to respondent on the issue of his intent to defraud the banks. In that setting, the court faced an imposing task in seeking to determine whether the prosecutor had failed to introduce substantial exculpatory evidence before the grand jury. Thus, not only is the

court of appeals' rule unauthorized by any principle of grand jury law, but, as this case demonstrates, it would also impose a cumbersome burden on the district courts that those courts are ill-equipped to bear.

ARGUMENT

THE COURT OF APPEALS ERRED IN DISMISSING THE INDICTMENT ON THE GROUND THAT THE GOVERNMENT FAILED TO PRESENT EXCULPATORY EVIDENCE TO THE GRAND JURY

A. An Indictment That Is Valid On Its Face Is Not Subject To Challenge Because Of Alleged Inadequacies In The Evidentiary Presentation To The Grand Jury

The grand jury enjoys a unique status in the federal criminal justice system. *United States* v. *R. Enterprises, Inc.*, 111 S. Ct. 722, 726-727 (1991). The Fifth Amendment specifically recognizes the grand jury's role as the principal charging body in the federal system, requiring that the prosecution of all "infamous crime[s]" be initiated by grand jury indictment.

The grand jury functions today much as it did 200 years ago. It does not conduct adversarial hearings to determine guilt or innocence, but sits to determine whether there is probable cause to believe that a person should be tried on criminal charges. *United States* v. *Calandra*, 414 U.S. 338, 343 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665, 686-687 (1972); *Hale* v. *Henkel*, 201 U.S. 43, 59 (1906); *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962).

The grand jury's investigative and screening functions have resulted in the employment of procedures that are quite different from the procedures that have been developed to ensure a fair determination in the trial on the merits. In keeping with the grand jury's

broad investigative role, its proceedings are conducted *ex parte* and are not bound by formal rules of evidence. The grand jury is free to consider hearsay or other incompetent evidence as well as evidence that was illegally obtained. See, *e.g.*, Fed. R. Evid. 1101 (d)(2); *United States* v. *Calandra*, 414 U.S. at 345-346; *United States* v. *Blue*, 384 U.S. 251, 255 & n.3 (1966); *Lawn* v. *United States*, 355 U.S. 339, 349-350 (1958); *Costello* v. *United States*, 350 U.S. 359, 363-364 (1956). Indeed, grand jurors are not confined to the evidentiary record at all, but "may act on tips, rumors, * * * or [on] their own personal knowledge." *United States* v. *Dionisio*, 410 U.S. 1, 15 (1973).

Potential targets do not have a right to appear before the grand jury.[2] Nor do targets have the right to cross-examine witnesses or present evidence in support of their theory of the case.[3] A grand jury wit-

[2] *United States ex rel. McCann* v. *Thompson*, 144 F.2d 604, 605-606 (2d Cir.) (L. Hand, J.) ("[T]he practice [of allowing the target to testify before the grand jury] was utterly unknown at common law, and although grand juries have in recent times occasionally invited persons * * * to appear, they are never obliged to do so."), cert. denied, 323 U.S. 790 (1944); *Duke* v. *United States*, 90 F.2d 840, 841 (4th Cir. 1937) (per curiam) ("There is no right on the part of one whose conduct is being investigated by a grand jury to petition the grand jury or to appear before it, which is guaranteed by the Constitution or otherwise."); *United States* v. *Fritz*, 852 F.2d 1175, 1178 (9th Cir. 1988) (same), cert. denied, 489 U.S. 1027 (1989).

[3] Historically, the grand jury did not receive evidence from potential defendants. As Blackstone noted:

> Th[e] grand jury * * * are only to hear evidence on behalf of the prosecution: for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths, whether there be sufficient cause to call upon the party to answer it.

4 W. Blackstone, *Commentaries* *303. Blackstone added that the grand jury should not issue indictments based on "remote possibilities," but should be persuaded of their truth "so far as their evidence goes." *Ibid.* The rule that defendants have no right to present evidence to the grand jury represents the uniform American practice as well. See *United States* v. *Bolles*, 209 F. 682, 685 (W.D. Mo. 1913) (collecting authorities).

ness cannot "insist, as a matter of constitutional right, on being represented by his counsel" in the grand jury room. *In re Groban*, 352 U.S. 330, 333 (1957); Fed. R. Crim. P. 6(b). The constitutional requirement of a public trial does not apply to the grand jury; to the contrary, grand jury proceedings are required to be conducted in secret, and the proceedings are shielded from subsequent disclosure by strict rules of secrecy. See Fed. R. Crim. P. 6(e); *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 218 (1979). In contrast to the verdict of a petit jury, which must be the product of a unanimous finding of guilt beyond a reasonable doubt, an indictment may be returned by the grand jury if a bare majority of the grand jurors find probable cause. See Fed. R. Crim. P. 6(a) and (f). And in the event that the grand jury declines to charge a suspect, the prosecutor may re-present the case and obtain an indictment from another grand jury. See *Ex parte United States*, 287 U.S. 241, 250-251 (1932); *United States* v. *Thompson*, 251 U.S. 407, 413-415 (1920).

These characteristics describe an institution that is largely independent of judicial supervision and serves only preliminary investigative and screening functions. Recognizing the character of the institution, this Court has held that it is contrary to the basic

function of the grand jury to permit judicial challenges to the adequacy of the evidence on which an indictment rests. Not only would litigation of such motions compromise grand jury secrecy in many cases, but "[a]ny holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionisio*, 410 U.S. at 17; see also *United States* v. *R. Enterprises, Inc.*, 111 S. Ct. at 726-727. Rules that would allow the defendant to attack the sufficiency of the record before the grand jury would "make of the grand jury a pawn in a technical game instead of respecting it as a great historic instrument of lay inquiry into criminal wrongdoing." *United States* v. *Johnson*, 319 U.S. 503, 512 (1943).

In *Costello* v. *United States*, 350 U.S. 359 (1956), this Court relied on those considerations in holding that an indictment that is valid on its face is not open to attack on the ground that only hearsay evidence was presented to the grand jury. The Court ruled broadly that, under the Fifth Amendment, "[a]n indictment returned by a legally constituted and unbiased grand jury * * * is enough to call for trial of the charge on the merits." *Id.* at 363 (footnote omitted). The Court explained that "[i]f indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed," because "before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury." *Ibid.* The Court similarly refused to invoke the supervisory

power to allow "defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence." *Id.* at 364. Such an innovation, the Court stated, would conflict with the history of the grand jury as a body whose inquiries are not governed by "technical rules." *Ibid.* Moreover, the Court noted, there is no reason to permit such challenges to the indictment because defendants are guaranteed a fair trial on the merits by the procedural protections that apply in that setting. *Ibid.*

The rule that the Court articulated in *Costello* is one of long standing. As the Court explained in *Ex parte United States*, 287 U.S. at 250, "the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer." In that case, the Court held that the district court could not refuse to issue an arrest warrant based on the indictment; the Court explained that the "question whether there was probable cause for putting the accused on trial was for the grand jury to determine," not for the district court. *Id.* at 249. The "power and duty of the grand jury to investigate," the Court continued, is not subject to the executive or the judicial power, but "is original and complete, and may be exercised upon its own motion and upon such knowledge as it may derive from any source which it may deem proper." *Id.* at 250-251. See also *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 261 (1988) (a facially valid indictment is not subject to challenge based on "the reliability or competence of the evidence presented to the grand jury"); *Lawn* v. *United States*, 355 U.S. at 349 ("this Court has several times ruled that an indictment returned by a legally constituted non-biased

grand jury, like an information drawn by a prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment"); *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, 599 (1950) (grand jury's decision to indict "is conclusive on the issue of probable cause. As a result the defendant can be arrested and held for trial" without any judicial intervention).

The Court reaffirmed those principles in *United States* v. *Calandra*, *supra*, declaring that "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." 414 U.S. at 345. In *Calandra*, the Court held that the Fourth Amendment exclusionary rule does not apply to grand jury proceedings. The Court pointed out that "[p]ermitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings." *Id.* at 349. Grand jury proceedings would be transformed "into preliminary trials on the merits," creating the potential for delay that "might be fatal to the enforcement of the criminal law." *Id.* at 350.[4]

[4] The Court has, of course, taken a different view of violations of the rules or statutes governing grand jury proceedings, where judicial challenges are permissible and relief may be available, at least where the violation is recognized prior to the trial on the merits. See *United States* v. *Mechanik*, 475 U.S. 66 (1986); *Bank of Nova Scotia* v. *United States*, *supra*. Thus, in *Bank of Nova Scotia*, this Court addressed the question of the degree of prejudice required in order to dismiss an indictment once it is found that a prosecutor engaged in misconduct before the grand jury. 487 U.S. at 256-257. This case involves the distinct issue of whether it is misconduct at all for the prosecutor not to present known exculpatory evidence to the grand jury.

B. An Indictment Should Not Be Dismissed On The Ground That The Prosecutor Did Not Present Exculpatory Evidence To The Grand Jury

The court of appeals' holding that an indictment may be challenged because of the prosecutor's failure to disclose exculpatory evidence to the grand jury cannot be reconciled with the principles underlying *Costello* and *Calandra*. In addition, such a rule would be difficult to apply in practice, and it would pose serious practical obstacles to the grand jury's performance of its investigative and charging responsibilities, while offering little by way of countervailing benefit to the criminal justice system.

1. A Rule Requiring the Prosecutor To Present Exculpatory Evidence Is Incompatible with the Grand Jury's Functions

In *United States* v. *Calandra*, this Court recognized that a grand jury investigation is "not an adversary hearing in which the guilt or innocence of the accused is adjudicated." 414 U.S. at 343. A rule that mandates the disclosure of exculpatory evidence to the grand jury is inconsistent with that principle. Because of the *ex parte* nature of its proceedings, the grand jury cannot be expected to anticipate and explore all possible trial defenses before determining whether to indict.

The grand jury has no formal process for the development of defenses. Nor is it possible to create such a procedure without compromising the ability of the grand jury to work in secrecy and to pursue investigations as it sees fit. Encumbering the grand jury with the responsibility of considering alleged exculpatory evidence would extend and complicate its

proceedings, and it would invite the grand jury to move from its limited screening role to the broader role reserved for the petit jury—determining the ultimate question of guilt or innocence.

When the grand jury concludes that the facts before it warrant a public trial to test the prosecution's allegations, it has completed its essential function. It would be a distortion of the grand jury's traditional responsibility to require it to consider not only the evidence submitted by the prosecution that supports a finding of probable cause, but also to consider the evidence submitted by a prospective defendant, or the evidence that the prosecutor anticipates the prospective defendant might seek to introduce at the trial on the merits. Yet that is what the court of appeals' rule would require the grand jury to do.

The court of appeals' rule would give rise to precisely the sort of "preliminary trials on the merits" that the Court warned against in *Calandra*, 414 U.S. at 350, and *Costello*, 350 U.S. at 363. In order to determine whether the prosecutor failed to provide the grand jury with known exculpatory evidence, substantial or otherwise, it would be necessary for the court to examine the transcripts of the grand jury proceedings; to determine what material was in the prosecutor's files and what the prosecutor knew of it; and to hold hearings in order to evaluate the totality of the evidence relating to the charges against the defendant. The court might also have to second-guess the grand jury's decision not to question the prosecutor about particular details of the case or to subpoena additional evidence. And to decide whether exculpatory evidence might have made a difference, the court, in effect, would have to reevaluate the

grand jury's ultimate determination that, on the existing record, an indictment was warranted.[5]

Neither the Constitution nor the supervisory power of the federal courts furnishes support for a rule such as the one adopted by the court of appeals in this case.[6] The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." The protection afforded by the constitutional guarantee of a grand jury does not require or contemplate judicial oversight of the

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[5] Three courts of appeals have squarely rejected any rule that the prosecutor must present exculpatory evidence to a grand jury. See *United States* v. *Larrazolo*, 869 F.2d 1354, 1359 (9th Cir. 1989); *United States* v. *Hawkins*, 765 F.2d 1482, 1488 (11th Cir. 1985), cert. denied, 474 U.S. 1103 (1986); *United States* v. *Adamo*, 742 F.2d 927, 937 (6th Cir. 1984), cert. denied, 469 U.S. 1193 (1985). Two courts of appeals have stated, in more qualified terms, that a prosecutor normally has no such duty; neither of those circuits, however, has ever dismissed an indictment because of the prosecutor's failure to present exculpatory evidence. See *United States* v. *Rivera-Santiago*, 872 F.2d 1073, 1087 (1st Cir.), cert. denied, 492 U.S. 910 (1989); *United States* v. *Vincent*, 901 F.2d 97, 99 (8th Cir. 1990). Two courts of appeals, other than the Tenth Circuit, have spoken with approval of a requirement that prosecutors must disclose substantial exculpatory evidence to the grand jury, but they too have never dismissed an indictment for that reason. See *United States* v. *Ciambrone*, 601 F.2d 616, 622-623 (2d Cir. 1979); *United States* v. *Flomenhoft*, 714 F.2d 708, 712 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984). The Tenth Circuit stands alone in upholding the dismissal of an indictment based on this theory.

[6] The court of appeals gave no indication, either in this case or in the predecessor case, *United States* v. *Page*, 808 F.2d at 727-728, what source of authority purports to justify the court's rule.

competence or sufficiency of the evidence presented to that body. It follows that the defendant is not denied his constitutional right to an "indictment of a Grand Jury" when the indictment rests on a presentation of the facts that is arguably incomplete because there is additional material that could be presented by way of defense.

Nor does the supervisory power of the federal courts justify a differing result. "The balance struck * * * between societal costs and the rights of the accused may not casually be overlooked 'because a court has elected to analyze the question under the supervisory power.'" *Bank of Nova Scotia*, 487 U.S. at 255, quoting *United States* v. *Payner*, 447 U.S. 727, 736 (1980). In light of this Court's explicit determination under the Constitution that the grand jury should be free from rules that would impede its investigative and charging functions, the supervisory power should not be invoked to produce a different outcome. Indeed, this Court has previously rejected supervisory power as a means for defendants to challenge the evidentiary basis for an indictment. See *Costello*, 350 U.S. at 363-364. Significantly, the Federal Rules of Criminal Procedure do not impose a duty on the prosecutor to present exculpatory evidence to the grand jury. Such a duty should therefore not lightly be imposed by a court simply because the court regards it as reflecting good practice. See *United States* v. *Mechanik*, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring) ("Prosecutors have been accorded * * * [wide] leeway in presenting their cases to the grand jury," subject to being "bound by a few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions").

It is the traditional place of the grand jury—not the district judge—to guard against the possibility that a prosecutor may seek an indictment out of malice or personal bias. See *Hale* v. *Henkel*, 201 U.S. at 59 (the function of the grand jury is to "stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will"); *Wood* v. *Georgia*, 370 U.S. at 390; *United States* v. *Mandujano*, 425 U.S. 564, 571 (1976) (plurality opinion); *United States* v. *Mechanik*, 475 U.S. at 73-74 (O'Connor, J., concurring). Grand juries are thought to perform that function precisely because their members bring to the evaluation of the prosecutor's presentation the common sense and values of the community at large. If the jurors have doubts about the evidence presented to them, they are authorized to ask such questions or compel such evidence as they deem necessary to form a sufficient understanding of the case.[7]

The court of appeals' rule departs from that understanding by putting courts, not the grand jurors, in the position of judging the prosecutor's evidentiary presentations. Such judicial intrusion into the workings of the grand jury is not in keeping with the grand jury's constitutional status as an entity that belongs neither to the executive nor to the judicial branch. See *United States* v. *Udziela*, 671 F.2d 995,

[7] Grand juries are fully empowered to investigate crimes based on their own knowledge or information, *Hale* v. *Henkel*, 201 U.S. at 58-66, and to insist upon additional evidence being taken before returning an indictment. "A grand jury 'may compel the production of evidence or the testimony of witnesses as it considers appropriate.'" *United States* v. *R. Enterprises, Inc.*, 111 S. Ct. at 726.

999 (7th Cir. 1982), cert. denied, 457 U.S. 1135 (1982); *United States* v. *Chanen*, 549 F.2d 1306, 1312-1313 (9th Cir. 1977), cert. denied, 434 U.S. 825 (1977); Note, *Grand Jury: A Prosecutor Need Not Present Exculpatory Evidence*, 38 Wash. & Lee L. Rev. 110, 117 (1981) ("a court that dismisses a validly returned indictment is more guilty of interfering with the independence of the grand jury than a prosecutor who presents a slanted case to the grand jury").[8]

[8] That is not to say that courts are without authority to protect against "outrageous or intentional prosecutorial misconduct" before the grand jury that prejudices the rights of the defendant. See *United States* v. *Udziela*, 671 F.2d at 1001; *Bank of Nova Scotia* v. *United States*, 487 U.S. at 254-255. For example, if the prosecutor were intentionally to present perjured testimony on a material issue for the purpose of deceiving the grand jury, it could so subvert the integrity of the grand jury process as to justify judicial intervention. Cf. *Franks* v. *Delaware*, 438 U.S. 154, 164-171 (1978) (discussing analogous considerations in holding that a search warrant affidavit may be challenged when supported by deliberately false police statements). At a certain point, the prosecutor's misconduct may become so grave that the defendant can fairly be said to have been denied his right to be indicted by a grand jury. Cf. *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 802 (1989). But no such concerns about the integrity of the grand jury process are raised by the simple claim, made here, that the prosecutor presented evidence indicating that the defendant committed a crime, without at the same time presenting other evidence supporting a theory that the defendant did not. It is deeply rooted in the history of the grand jury system that defenses need not be tried by the grand jury.

2. *The Burdens of the Proposed Rule Would Significantly Outweigh Any Possible Benefits*

The court of appeals claimed that a rule requiring substantial exculpatory evidence to be revealed to a grand jury would promote "judicial economy," because "[if] a fully informed grand jury cannot find probable cause to indict, there is little chance the prosecution could have proved guilt beyond a reasonable doubt to a fully informed petit jury." Pet. App. 5a, quoting *United States* v. *Page*, 808 F.2d at 728. That argument relies on a perception of judicial economy that is largely illusory.

A defendant's assertion that the prosecutor failed to present known exculpatory evidence that undercuts probable cause will frequently be difficult to assess without a hearing. The court must consider the significance of the evidence on which the defendant relies and gauge its probative value. The court will also have to determine what evidence was, in fact, known to the prosecutor and put before the grand jury. That process in itself may be quite complex: Even if the alleged exculpatory evidence was available to the prosecutor, the court may have to determine whether the prosecutor was aware of the exculpatory evidence and appreciated its potentially exculpatory nature. The court will also have to determine whether the prosecutor decided not to present the evidence in question because, in the prosecutor's view, the evidence was clearly false, and whether that is a sufficient justification for declining to present evidence that is favorable to the defendant.[9]

[9] In the course of an investigation, a prosecutor frequently encounters evidence that he regards as unworthy of belief, such as self-serving statements of the defendant or his allies

After that process, a large majority of such claims will likely fail because the evidence is not sufficiently exculpatory to negate probable cause.[10] Even if the

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or family members, or even statements of an unbiased witness whose observations, in the prosecutor's view, have been conclusively rebutted by other witnesses. Prosecutors typically winnow such evidence and do not deem it necessary to waste the grand jury's time by presenting it and then presenting the evidence that rebuts it. Under the court of appeals' rule, however, the prosecutor may not have that luxury.

[10] The vast majority of cases involving a claim of non-disclosure of exculpatory evidence have concluded that the withheld evidence did not rise to the level requiring disclosure to the grand jury. See, *e.g.*, *United States* v. *Page*, 808 F.2d at 728 (evidence that illicit payoffs were recorded as legitimate payments); *United States* v. *Reid*, 911 F.2d 1456, 1460 (10th Cir. 1990) (criminal history of a witness), cert. denied, 111 S. Ct. 990 (1991); *United States* v. *Dyer*, 750 F. Supp. 1278, 1300-1301 (E.D. Va. 1990) (speeches and reports suggesting that offense at issue was defined ambiguously); *United States* v. *Giovanelli*, 747 F. Supp. 875, 883 (S.D.N.Y. 1989) (impeachment material). Only a handful of district courts have found to the contrary, and none of those cases relied exclusively on a theory of non-disclosure of exculpatory evidence in finding misconduct before the grand jury sufficient to justify dismissal of the indictment. See, *e.g.*, *United States* v. *Gold*, 470 F. Supp. 1336, 1352-1353 (N.D. Ill. 1979) (prosecutor did not allow witness to explain change in viewpoint about validity of report that was alleged to be false and did not present evidence of other reports on the issue); *United States* v. *Phillips Petroleum Co.*, 435 F. Supp. 610, 619-620 (N.D. Okla. 1977) (prosecutor did not present a witness's explanation for failing to report income, which bore on the defendant's intent); *United States* v. *Braniff Airways, Inc.*, 428 F. Supp. 579, 586 (W.D. Tex. 1977) (prosecutor did not present legal defense to antitrust charge based on statutory immunity); *United States* v. *DeMarco*, 401 F. Supp. 505, 513-514 (C.D. Cal. 1975) (prosecutor did not present evidence indicating that defendant was threatened with additional

courts could correctly identify those few cases in which the withheld exculpatory evidence is so powerful that it would likely motivate the grand jury not to indict, it is certain that the courts would spend far more time reviewing meritless claims raised by creative defendants seeking to put the prosecutor on trial for his conduct before the grand jury. The marginal benefits, if any, that would flow from that regime would come at far too high a cost.

The prosecutor has ample incentives not to seek an indictment where the chances of a conviction based on a full record are remote. As this Court has recognized, "[f]or the most part, a prosecutor would be unlikely to request an indictment where a conviction could not be obtained." *Calandra*, 414 U.S. at 351. Prosecutors have nothing to gain and much to lose if they obtain an unsustainable indictment, only to see their case collapse at trial. Moreover, the Due Process Clause requires a prosecutor to turn over to the defendant, after indictment, material exculpatory evidence in the government's possession of which the prosecutor is aware. See *Brady* v. *Maryland*, 373 U.S. 83 (1963); *United States* v. *Agurs*, 427 U.S. 97 (1976). It would make little sense for a prosecutor to suppress powerful exculpatory evidence in order to obtain an indictment, only to be compelled to reveal the evidence to the defendant as soon as the indictment has issued. There is even less incentive to obtain an indictment in a case in which the exculpatory evidence is in the possession of the target from the outset, and where the prospect of embarrassment at trial is certain.

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charges if he did not withdraw his challenge to venue), aff'd on other grounds, 550 F.2d 1224 (9th Cir.), cert. denied, 434 U.S. 827 (1977).

The costs of the Tenth Circuit's rule would not be reduced by defining the prosecutor's duty to present exculpatory evidence as applying only to "substantial" exculpatory evidence. Pet. App. 5a. In advance of judicial determination, it is difficult to predict where a court would draw the line between "substantial" exculpatory evidence and exculpatory evidence that has some lesser qualitative value for the defense. A wide variety of evidence can be identified as exculpatory to some degree.[11] Indeed, the Tenth Circuit has interpreted its rule to require that "the grand jury must receive any information that is relevant to any reasonable theory it may adopt." Pet. App. 8a. Under that broad standard, prosecutors are confronted with the dilemma of presenting all conceivable evidence that may support some hypothetical defense, or risking protracted pretrial litigation and possible dismissal of the indictment.[12] A rule so nebu-

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[11] The breadth of the types of evidence that might be thought to be exculpatory is illustrated by respondent's motion in this case seeking the disclosure of *Brady* material in 18 separate categories. J.A. 47-50. Defendants relying on the court of appeals' holding in this case could be expected to be equally expansive in their claims that "substantial" exculpatory evidence was not furnished to the grand jury.

[12] Such a situation could easily allow defendants to circumvent the rule that the defense has no right to present evidence to the grand jury. See, *e.g.*, *United States* v. *Law Firm of Zimmerman & Schwartz, P.C.*, 738 F. Supp. 407, 411 (D. Colo. 1990) (district court rejected a claim that the prosecutor had failed to present exculpatory evidence where the prosecutor had presented "detailed letters" and "corresponding exhibits" submitted by the defendant's attorney explaining why an indictment was unwarranted; permitted a character witness to testify for a second time; and presented the grand jury with the defendant's proposed instructions on the law), aff'd *sub nom. United States* v. *Brown*, 943 F.2d 1246, 1257 (10th Cir. 1991).

lous as to pressure the government to prolong its presentations in nearly every case has obvious potential for sowing confusion and for delaying the grand jury's investigation.

The burdens imposed by the court of appeals' rule would be particularly acute in white-collar criminal cases, where investigations frequently generate thousands of documents that could support a myriad of possible theories of defense. Those defenses generally emerge and crystalize long after the investigative phase of a case. To allow retrospective examination of grand jury records in such document-intensive cases could afford defendants a source of discovery to which they are not routinely entitled under the Federal Rules of Criminal Procedure. And to dismiss the indictment, so that the prosecutor could present to the grand jury the evidence that the court considered exculpatory, would impose additional costs and delays and inevitably provoke further disputes about the adequacy of the record that formed the basis for the second indictment.

There will doubtless be occasional cases in which the prosecutor did not present known, exculpatory evidence that likely would have prompted the grand jury not to indict. But a general rule that opens all indictments to challenge, and imposes considerable costs on the criminal justice system as a whole, should not be formulated to deal with the tiny minority of cases in which a fuller evidentiary record would have led to a different outcome.[13] It is internal Department of Justice policy that

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[13] The numbers of such cases have historically been very small. For example, we are unaware of any published decision in the past decade, other than this one, in which a federal court has found that the prosecutor misled the grand jury by

> when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person.

United States Attorneys' Manual ¶ 9-11.233, at 18 (1990). Violations of that policy or other more general standards of professional conduct could expose the prosecutor to disciplinary sanctions.[14] The enforcement of such professional standards is a far better way to deal with the isolated instances in which known, material exculpatory evidence is withheld from the grand jury than the sweeping, burdensome, and intrusive rule devised by the court of appeals.

C. The Indictment In This Case Should Not Have Been Dismissed

Respondent's indictment charged him with fraud in the use of false financial statements to obtain loans from banks. The district court determined that certain of respondent's financial documents and his deposition testimony from another proceeding could have

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failing to present exculpatory evidence that would likely have led the grand jury not to indict.

[14] The standard applied internally by the Department of Justice is not equivalent to the court of appeals' rule. The court's standard, particularly as articulated in this case—requiring a prosecutor to present "any information that is relevant to any reasonable theory" of defense, Pet. App. 8a—goes far beyond the Department's policy and imposes amorphous obligations on prosecutors that are enforceable by the sanction of dismissal of the indictment.

created "reasonable doubt" that respondent had fraudulent intent. Accordingly, the district court concluded that the evidence constituted "substantial exculpatory information that would have assisted the grand jury in fairly evaluating intent within the context of all the relevant evidence." Pet. App. 26a. Although the district court's reference to the "reasonable doubt" standard in the context of a grand jury investigation should have highlighted the error in the court's approach, the court of appeals affirmed the district court's ruling. Indeed, the court of appeals went farther, stating that "the grand jury must receive any information that is relevant to any reasonable theory it may adopt," *id.* at 8a, and that the withheld evidence should have been disclosed because it was "consistent with the possible theory that [respondent] simply did not intend to mislead the banks." *Id.* at 11a.

The court of appeals' interpretation of the appropriate role for a court in reviewing the prosecutor's presentation to the grand jury is legally erroneous. The allegedly exculpatory evidence at issue in this case, while perfectly appropriate for the defendant to use in urging the petit jury to acquit, does not represent material that the prosecutor was obligated to present to the grand jury in seeking an indictment. And the reasoning that led the district court and the court of appeals to conclude that the indictment had to be dismissed was premised on a misunderstanding of proper relationship between the grand jury and the court.

This case provides a useful example of the mischief that can flow from a rule of the sort adopted by the court of appeals. The product of a fairly typical financial fraud investigation, this case involved a

lengthy and complex grand jury investigation. As is often true in such cases, the issue of guilt turns on the question of intent. The government introduced a large amount of evidence going to the issue of intent, including some evidence that was favorable to respondent. In such a setting, the district court should have been wary of deciding, on a necessarily limited record, that the prosecutor's failure to present two discrete categories of evidence probably affected the jury's decision to indict. That is particularly true here, since one of the principal items of evidence on which the district court and the court of appeals relied was the defendant's own prior testimony in a separate proceeding, the type of evidence that the fact-finder might ordinarily view skeptically. Moreover, it is far from clear that the fact that respondent made the same representations concerning his financial condition in other financial statements indicated that he had no intent to mislead the banks. The exculpatory effect, if any, of that evidence would depend on the circumstances in which those statements were prepared and used, factors that were not fully revealed by the financial statements themselves. This case thus exemplifies both the burdensomeness of the inquiry required by the court of appeals' rule, and the likelihood that the inquiry will result in error.

In sum, the grand jury was not required to determine conclusively whether respondent in fact intended to defraud the banks from which he sought loans. Acting in compliance with all the rules and statutes governing its proper functioning, the grand jury found probable cause to believe that respondent did act to defraud the banks, and it therefore called upon respondent to answer those charges. Because the prosecutor was not under a judicially enforceable

obligation to present exculpatory evidence to the grand jury, respondent's motion to dismiss the indictment should have been denied.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE, 1991 312324 45177

Supreme Court, U.S.
FILED
DEC 30 1991
OFFICE OF THE CLERK

No. 90-1972

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN H. WILLIAMS, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF RESPONDENT

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December 1991

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether an indictment may be dismissed without prejudice, pursuant to the district court's supervisory powers, when the government withholds from the grand jury substantial exculpatory evidence negating an essential element of the offense charged.

TABLE OF CONTENTS

	Page
Question Presented	i
Jurisdiction	1
Statement of the Case	1
The Dismissal	1
Proceedings Prior to Dismissal	3
The Factual Underpinnings of the Dismissal Order	9
The Government's Explanation	14
Summary of Argument	19
Argument	22
A. The Grand Jury Performs the Dual Functions of Determining Whether There is Probable Cause and Protecting Citizens From Government Overreaching – The Presentation of Substantial Evidence Negating Guilt is Fully Consistent With These Functions and Imposes no Significant Burden on the Courts or the Government	22
B. The Substantial Nature of the Exculpatory Evidence Distinguishes This Case From Decisions Rendered by Other Circuits	31
C. The Tenth Circuit's Standard Requiring Prosecutors to Present Substantial Exculpatory Evidence Which Clearly Negates a Target's Guilt is Consistent With the Court's Exercise of its Supervisory Powers	43
Conclusion	50

TABLE OF AUTHORITIES

	Page
CASES:	
Bank of Nova Scotia v. United States, 487 U.S. 250 (1988)	*passim*
Brady v. Maryland, 373 U.S. 83 (1963)	5, 7
Branzburg v. Hayes, 408 U.S. 665 (1972)	25
Costello v. United States, 350 U.S. 359 (1956)	23, 25, 43, 49
Craig v. Boren, 429 U.S. 190 (1976)	33
Hale v. Henkel, 201 U.S. 43 (1906)	24
Hoffman v. United States, 341 U.S. 479 (1951)	24, 25
In Matter of the Special April 1977 Grand Jury, 587 F.2d 889 (7th Cir. 1978)	39
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923)	43
NCAA v. Bd. of Regents of Univ. of Ok., 468 U.S. 85 (1984)	49
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955)	43
Richardson v. Perales, 402 U.S. 70 (1955)	33
Rogers v. Lodge, 458 U.S. 613 (1982)	49
Stirone v. United States, 361 U.S. 212 (1960)	24, 25, 49
United States v. Adamo, 742 F.2d 927 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985)	32, 34, 42
United States v. Basurto, 497 F.2d 781 (9th Cir. 1974)	28, 40
United States v. Bowdach, 324 F. Supp. 123 (S.D. Fla. 1971)	48
United States v. Borys, 169 F. Supp. 366 (D. Alaska 1959)	48

TABLE OF AUTHORITIES – Continued

Page

United States v. Braniff Airways, Inc., 428 F. Supp. 579 (W.D. Tex. 1977) 28

United States v. Calandra, 414 U.S. 338 (1974) . 25, 43, 49

United States v. Ciambrone, 601 F.2d 616 (2d Cir. 1979) 37

United States v. Civella, 666 F.2d 1122 (8th Cir. 1981) 37

United States v. DeMarco, 401 F. Supp. 505 (C.D. Cal. 1975), *aff'd on other grounds*, 550 F.2d 1224 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977) 28

United States v. Dionisio, 410 U.S. 1 (1973) 25

United States v. Dorfman, 532 F. Supp. 1118 (N.D. Ill. 1981) 40

United States v. Flomenhoft, 714 F.2d 708 (7th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984) 25, 38

United States v. Fulmer, 722 F.2d 1192 (5th Cir. 1983) 44

United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979) 28, 39

United States v. Hawkins, 765 F.2d 1482 (11th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986). 32, 34, 35, 42

United States v. Isgro, 751 F. Supp. 846 (C.D. Cal. 1990) 28, 49

United States v. Kilpatrick, 821 F.2d 1456 (10th Cir. 1987), *aff'd*, 487 U.S. 250 (1988) 45

United States v. Larrazolo, 869 F.2d 1354 (9th Cir. 1989) 32, 35, 42

TABLE OF AUTHORITIES – Continued

Page

United States v. Lawson, 502 F. Supp. 158 (D. Md. 1980) 49

United States v. Mechanik, 475 U.S. 66 (1986) . . 26, 45, 47

United States v. North, 708 F. Supp. 370 (D.D.C. 1988) 42

United States v. Page, 808 F.2d 723 (10th Cir.), *cert. denied*, 482 U.S. 918 (1987) ..... *passim*

United States v. Phillips Petroleum Co., 435 F. Supp. 610 (N.D. Okla. 1977) 28, 48, 49

United States v. Provenzano, 440 F. Supp. 561 (S.D.N.Y. 1977) 49

United States v. R. Enterprises, Inc., 111 S. Ct. 722 (1991) 25

United States v. Recognition Equipment Inc., 711 F. Supp. 1 (D.D.C. 1989) 41

United States v. Reid, 911 F.2d 1456 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 990 (1991) 28

United States v. Rivera-Santiago, 872 F.2d 1073 (1st Cir.), *cert. denied*, 492 U.S. 910 (1989) 36

United States v. Sells Engineering, Inc., 463 U.S. 418 (1983) 26

United States v. Smith, 838 F.2d 436 (10th Cir. 1988) 20

United States v. Soberon, 929 F.2d 935 (3d Cir. 1991) 48

United States v. Udziela, 671 F.2d 995 (7th Cir.), *cert. denied*, 457 U.S. 1135 (1982) 26

United States v. Vincent, 901 F.2d 97 (8th Cir. 1990) 36

TABLE OF AUTHORITIES – Continued

Page

United States v. Wilson, 798 F.2d 509 (1st Cir. 1986) 39

Wood v. Georgia, 370 U.S. 375 (1962) 24, 25

CONSTITUTIONAL PROVISIONS, STATUTES, RULES, AND REGULATIONS:

U.S. Const.:

Amend. V 18

11 U.S.C. § 1101(2) 33

18 U.S.C. § 1014 20

26 U.S.C. § 6661(b)(1) 34

28 U.S.C. § 1254(1) 1

Fed.R.Crim.P.:

Rule 6 26

20 C.F.R. 404.1575 33

MISCELLANEOUS:

American Bar Association Standards for Criminal Justice, § 3-3.6(b) (1980) 29

Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 Mich. L. Rev. 463 (1980) 49

1 S. Beale & W. Bryson, *Grand Jury Law & Practice* (1986) 23, 27, 29

Oklahoma Rules of Professional Conduct, Rule 1.10(b), Okla. Stat. tit. 5, chapter 1, app. 3-A (1991) 34

United States Attorneys' Manual (1990) 29

No. 90-1972

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN H. WILLIAMS, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF RESPONDENT

JURISDICTION

The jurisdiction of the Court has been invoked by petitioner under Title 28, U.S.C., Section 1254(1).

STATEMENT OF THE CASE

The Dismissal

On October 19, 1988, the district court dismissed the indictment without prejudice. The basis of the court's decision was that the government had withheld substantial exculpatory information from the grand jury "on perhaps the most crucial element [intent to defraud] of

the crime charged . . . . " Pet. App. 26a. The court concluded that the failure to present that evidence rendered the grand jury's decision to indict "gravely suspect." *Id.* The district court had previously denied respondent's dismissal motion but, upon respondent's request that it be reconsidered in light of circumstances which had developed, changed its prior ruling and entered the dismissal order. Pet. App. 19a-26a.[1]

[1] The district court entered its order granting the motion to reconsider on October 17, 1988, the first day of trial. The court delivered its ruling from the bench following evidentiary hearings and oral arguments in connection with respondent's motion in limine and motion to reconsider, as well as the Government's Memorandum of Law on Variance of Proof (filed October 14, 1988). The "variance of proof" issue arose from the prosecution's belated assertion that its trial evidence would show under Count V of the indictment that respondent "actually falsely stated his yearly income to be $350,000 [rather than $199,176.00]." *Id.* at 1 (emphasis in original). This position was particularly noteworthy with respect not only to the variance issue, but also with regard to the prospect of dismissal because (i) the government did not allege in Count V (or in any other count relating to respondent's income statements) that respondent misstated his "yearly income," (ii) the figure to which the government alluded in Count V ($199,176.00) was the interest income component of respondent's total income for 1984, (iii) respondent's general ledgers and tax returns established that respondent did in fact receive and report $199,176.00 in interest income for calendar 1984, and (iv) the government's awkward effort to describe a "variance" undoubtedly resulted from its attempt to cope with the infirmities of an indictment which resulted from a presentation to the grand jury which was not only incomplete, but based on erroneous assumptions.

Proceedings Prior to Dismissal

Prior to the grand jury proceedings, the government had investigated respondent's banking transactions and financial statements for more than a year. The government obtained, through several subpoenas, access to substantial materials relating to respondent, as well as information from attorneys and parties involved in respondent's Chapter 11 bankruptcy proceeding. Appendices I, II and III, filed Oct. 3, 1988. The bankruptcy proceedings involved non-dischargeability claims in which substantial discovery had been conducted. The government obtained pleadings in the adversary proceedings, as well as documents and transcripts of depositions and hearings. *See, e.g.*, Addendum to Resp. Br. on appeal ("Add."), exs. A and B. The adversary proceedings included actions prosecuted by the banks referred to in the indictment to obtain determinations of non-dischargeability with regard to their claims against respondent. Therefore, the discovery in the adversary proceedings, which specifically related to the banks' claims of fraud and respondent's denial of any such fraud, involved exactly the same factual issues as those raised by the indictment.

Respondent was subpoenaed by the grand jury, but only to introduce documents. The subpoena, *id.* ex. A, specifically provided that it could be satisfied by production of documents. Respondent was never requested to testify. The government proceeded to obtain the documents subpoenaed, and others, from the trustee in bankruptcy or his counsel. Included in that material was respondent's five (5) volume deposition taken in the

adversary proceedings,[2] which contains detailed explanations of respondent's financial statements and the assets which the government claimed to be worthless. Complete copies of respondent's deposition testimony were submitted to the district court in connection with its consideration of respondent's dismissal motion.

On June 27, 1988, the United States Attorney, in response to a request for documents made by respondent's counsel, wrote a letter acknowledging respondent's request for "copies of transcripts of depositions taken in numerous civil cases, which involve directly, or indirectly, John Williams, Jr." *Id.* ex. C. The United States Attorney stated:

> It is our understanding that the above enumerated documents do not contain any *Brady* material. It is further our understanding that the above-referenced material will not be used as government exhibits in the pending criminal case. Moreover, the documents appear generally to be irrelevant to the issues presented by the indictment.

Id. at 1.[3]

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[2] A separate subpoena was issued by the government for the five volume transcript. *Id.* ex. B.

[3] Curiously, the government's brief on appeal took the position that "all of the information the defendant contends the Grand Jury should have received from his civil deposition was conveyed to the Grand Jury by other witnesses." Gov't Br. on App. at 30. The government did ultimately designate, contrary to the representations made by the United States Attorney, select portions of respondent's deposition testimony for use at trial. Add. ex. N.

On July 1, 1988, respondent filed a motion to compel disclosure of exculpatory evidence. J.A. 47-51. The government responded on July 15, 1988, stating that it was aware of its duty to provide respondent with such evidence, and would in fact comply with that duty. Gov't Resp. to Mot. to Compel Disclosure of Exculp. Evid. at 1. On July 22, 1988, respondent filed his Certification of Dispute Over Disclosure of Exculpatory Evidence.

On September 13, 1988, a hearing was held before the district court on the issue of the government's lack of disclosure of exculpatory evidence. The decision in *United States v. Page*, 808 F. 2d 723 (10th Cir.), *cert. denied*, 482 U.S. 918 (1987), was specifically cited to the district court by respondent and the United States Attorney indicated that he was not familiar with the *Page* case or its holding. September 13 hearing transcript, at 11. At the September 13 hearing, the United States Attorney presented the district court with an order which provided, in part, as follows:

> The government may disclose any and all testimony and evidence presented to the Grand Jury for the Northern District of Oklahoma which would be exculpatory in nature and fall within the mandates of *Brady v. Maryland*, 373 U.S. 83 (1963).

J.A. 52. The proposed order further provided that the government was permitted to disclose to respondent "edited" portions of the grand jury testimony while delivering to the court the complete transcript under seal. The district court entered the order, as presented, noting respondent's objection and his request for disclosure of the entire grand jury transcript. September 13 hearing

transcript, at 27. The United States Attorney further advised the district court at the September 13, 1988, hearing that the government would submit to respondent by September 16 all exculpatory materials and that submission was to include the "edited" grand jury transcript. J.A. 52-53.

On September 16, 1988, the government delivered to respondent's counsel excerpts from thirteen (13) FBI interview forms 302, a Credit Memorandum from Village South National Bank (one of the alleged victim banks), and twenty-six (26) pages of excerpted grand jury testimony from four (4) witnesses. Following receipt of the government's September 16 submission, a letter was written to the district court by respondent's counsel, which included the "exculpatory materials" for *in camera* review by the court. Add. ex. E. Respondent's letter to the court was delivered during the pendency of the court's review of the edited and unedited grand jury transcripts. The purpose of the letter was to apprise the court that, given the nature of the government's September 16, 1988, submission of exculpatory materials, disclosure of the entire transcript should be made to respondent's counsel. Respondent referred the court to the fact that many of the excerpts provided by the government were incomplete and contextually ambiguous. Moreover, there was no indication that eleven (11) of the thirteen (13) witnesses which provided exculpatory information to the government, as reflected by the 302s, testified before the grand jury. On September 23, 1988, the United States Attorney delivered a letter to the district court in response to respondent's letter of September 20. *Id.* ex. F. In that letter, the Assistant United States Attorney acknowledged

the government's obligation under *Page*, and represented to the trial judge that the government "went beyond" that obligation. *Id.* at 2. Accordingly, the government's attorney recommended that disclosure of the entire grand jury transcript was "neither necessary nor appropriate." *Id.*

On October 3, 1988, respondent moved to dismiss the indictment on the grounds that the prosecutor failed to disclose substantial exculpatory evidence to the grand jury. The motion was supported by a brief and three (3) volumes of evidentiary materials. The evidentiary material included respondent's deposition taken in the bankruptcy proceeding and the various documents and materials which the government had delivered in connection with its *Brady* obligations.

On October 6, 1988, the government filed a four (4) page response to the dismissal motion. The government's response failed to address any of the exculpatory evidence identified in respondent's papers or the *Brady* submission. The substance of the government's response is noteworthy when contrasted with its positions taken on appeal and in this Court. The government made three (3) arguments in responding to the dismissal motion. First, the government claimed that the dismissal motion should be denied because the "defendant has no right to try his case to the grand jury." Gov't Resp. to Mot. to Dis., Oct. 6, 1988, at 3. Second, the government claimed that it need not produce "any exculpatory evidence, but only that evidence which is substantial evidence negating guilt." *Id.* at 2 (emphasis in original). Third, the government claimed that dismissal "would be inappropriate in this

case, even if the defendant's allegations of improper government conduct before the Grand Jury were true." *Id.* at 4 (emphasis in original).

Respondent had not contended that he had a right to try his case to the grand jury. The government's second and third arguments directly conflict with the dictates of *Page*. The government entirely failed to address respondent's deposition testimony and the fact that, prior to the grand jury proceedings, it had in its possession respondent's general ledgers and tax returns which supported the absolute truth and accuracy of the income statements which the government claimed to be false. In its appeal brief, however, the government changed directions. Instead of ignoring respondent's extensive deposition testimony, or simply dismissing it as "perjurious" or "inculpatory" as it had before the trial court, Gov't Resp. to Mot. to Dis., Oct. 6, 1988, at 4, the government claimed that the testimony was "hearsay and would not be admissible at trial except as a prior consistent statement to rebut any inference of recent fabrication of the defendant's trial testimony." Gov't Br. on App. at 22 (emphasis in original). Yet, in the very same brief the government asserted that *all* of the information which respondent contended the grand jury should have received was actually presented to the grand jury.

On October 14, 1988, the district court entered an order denying the dismissal motion, Pet. App. 16a-18a, and on October 17 respondent filed a motion seeking reconsideration of that order. Trial had been scheduled to commence on October 17. After a jury was selected (but not sworn), the district court heard arguments and considered evidence on various pending motions, including

the motion to reconsider its prior order denying the motion to dismiss. *See* fn. 1, *supra*.

The Factual Underpinnings of the Dismissal Order

Examination of the indictment and the limited information and materials available through discovery indicated that it was the government's theory that certain entries on the documents it claimed to be materially false were overvalued. Respondent denied that any excessive valuation occurred. One of the primary examples of the problem presented by the indictment was respondent's presentation of his notes receivable in the three (3) financial statements which were at issue. J.A. 44, 45 and 46. At most, it seems that the grand jury viewed only limited excerpts from respondent's financial statements or any parts of his financial statements, and those references were not contextually accurate. Respondent's financial statements were prepared since 1975, on at least a semi-annual basis, with the assistance of The Horter Company. This was known to the government. Horter was, and is, a privately owned firm of certified public accountants which prepared financial statements and tax returns for Williams' family members and certain executives of The Williams Companies. Horter devised the form of statements and utilized the format for all of its clients, including respondent. When respondent received a draft of a new statement from Horter, the current balance of each note receivable had already been placed on the draft statement by Horter. Those numbers were accurate. *See* Pet. App. 23a-26a. Respondent then assigned market values to certain other assets (such as securities not traded on a public market). The government never

claimed those values to be false. *See* J.A. 14-23, 24-33 and 34-43.

Horter also maintained respondent's general ledger and compiled balances on each of the promissory notes which respondent designated as "Notes Receivable" on his statements. An examination of those documents supports the accuracy of amounts designated as notes receivable. The government received and reviewed the general ledgers for the applicable years. *See* Add. ex. M.

Every one of respondent's financial statements for the ten (10) year period 1975 through 1985, including the statements identified in the indictment, contained the following legend at the bottom of the first page of each balance sheet:

> * Marketable securities and certain investments have been adjusted to reflect fair market value on [date of statement]. All other assets are reflected at cost or other tax basis.

J.A. 14, 24 and 34. It is apparent from reviewing each balance sheet, in its entirety, that respondent did not attempt to adjust the notes receivable portion of the balance sheet to reflect such assets at "fair market value." Rather, respondent scheduled each note at face value, *i.e.*, the amount of money then due respondent on each promissory note. The government did not dispute those numbers, but merely criticized the manner in which the notes receivable were presented on the balance sheet.

From discussions with the United States Attorney and the FBI, respondent was advised that the government's principal concern with his financial statements involved a listing of notes receivable from Endex, Inc.,

Octave Plateau, and Skyfield Productions, Inc. These entities are closely held venture capital companies. Venture capital companies frequently have negative capital for several years, do not make interest payments in a timely fashion, and require substantial capital infusion. Such investments can, however, be lucrative if properly handled and not liquidated if they fail to perform precisely as projected. Respondent had previously invested over $500,000.00 in the Lexel Corporation, another venture capital company, and guaranteed substantial Lexel bank debt between 1973 and 1978. Lexel had negative capital for several years and could not pay interest in accordance with the terms of its note. In 1983, respondent sold his investment in Lexel for over $4,500,000.00. Pet. App. 25a. The experience with Lexel, which was detailed in the papers and depositions turned over to the government in connection with the Chapter 11 proceedings, supported respondent's continuing belief that Endex, Octave Plateau, and Skyfield could become successful and the notes repaid within a reasonable period of time. That evidence, all of which was in the government's possession, apparently was not presented to the grand jury.

Moreover, historical financial information regarding a venture capital company is not an accurate measure of that company's potential or ability to repay debt. That is what respondent believed then, and the government was in possession of evidence reflecting that belief. Respondent's views with regard to his venture capital investments were expressed in detail in his deposition testimony. The government had that testimony but did not use it. Nor did the government call respondent as a

witness so that the grand jury could have the benefit of his views. Pet. App. 24a.

During 1983 through 1985, respondent made loans on a regular basis to Endex, Skyfield, and Octave Plateau. In fact, the actual advances to these companies during that period of time were hundreds of thousands of dollars. This information is included not only in the deposition testimony of respondent, but in the general ledgers subpoenaed by the government. Add. ex. M. The government contended that respondent knew that the notes from these companies were substantially over-valued or worthless. However, evidence in the government's possession regarding respondent's loans to the venture capital companies is exculpatory on the issue of intent. Respondent had abiding faith in the future of those companies, and supported that belief in 1983, 1984 and 1985 (as he did prior to that time) by continuing to advance funds for operations. Appendices II and III, filed Oct. 3, 1988.

The government had access to and possession of a substantial amount of information. Yet, only a select fraction of the available documents, sworn testimony, and other information was presented to the grand jury. The government apparently did not show the grand jury respondent's complete financial statements for any meaningful period of time. Those statements are exculpatory inasmuch as they reflect a consistent, detailed, and lawful pattern of financial reporting by respondent. Pet. App. 9a. The government had information regarding the procedures employed by respondent and Horter to compile the statements but did not present that information to the grand jury. Respondent followed a method of reporting

his financial condition which was devised by a reputable accounting firm. The format utilized to present respondent's financial statement was absolutely consistent for over ten (10) years and was identical to the format used by Horter in the preparation of financial statements for all other clients. Respondent's financial statements were prepared by Horter with respondent's assistance prior to their dissemination on at least a semi-annual basis. Neither the CPAs nor respondent believed that notes receivable should be reported other than at face value. Respondent's figures were, in all instances, accurate. Any other valuation would have been speculation. The government was aware of all this, but elected not to present it to the grand jury. Pet. App. 25a.

The trial and appellate courts' conclusions that the grand jury was not furnished with substantial exculpatory evidence and was misled are supported by, among other things, the fact that the government claims that respondent's statements of income and expense during the period 1983 and 1984 were materially false. Indictment Counts II, III, V, VI and VII. If the government had presented to the grand jury information within its possession, it would have been clear to the grand jury that respondent's inclusion of interest income on those statements was completely accurate and consistent with the general ledgers maintained by Horter, respondent's federal income tax returns, and respondent's bank statements. Respondent reported interest and paid tax on that interest. Likewise, if the government had presented to the grand jury the general ledgers, or relevant excerpts from the general ledgers, the grand jury would have been able

to determine that respondent, with the assistance of Horter, accurately presented the note balances which comprise the "Notes Receivable" portion of the financial statements. If the government had presented the general ledgers to the grand jury, or relevant excerpts from the general ledgers, the grand jury would have determined that respondent loaned substantial amounts of money to the venture capital companies in 1984 and 1985, therefore evidencing a belief that the companies had intrinsic value and could repay the notes.

The Government's Explanation

In its brief before this Court, petitioner cites its response brief to respondent's motion to dismiss and claims that it "introduced the relevant financial records and account documents pertaining to the charged offenses, and that it called witnesses before the grand jury who had testified about respondent's confidence in his venture capital investments." Pet. Br. at 4. The government in fact took a host of positions as to why it did not submit the exculpatory material to the grand jury. In the trial court, the government excused its conduct by labeling the subject evidence "perjurious" and "inculpatory." Before the court of appeals, the government sought to excuse its conduct by an examination of the "relevance" or the "admissibility" of the exculpatory materials. The government prefaced the argument portion of its appeal brief with the statement that it "will discuss the relevance and admissibility of the [exculpatory] items in two sections: (1) the tax returns, general ledgers and financial statements; and (2) the defendant's deposition

testimony." Gov't Br. on App. at 14. The appeal brief continued, "[t]he government contends that the defendant's tax returns, general ledgers, and financial statements were in fact presented to the Grand Jury insofar as they were relevant." *Id.* at 15.

As to respondent's deposition testimony, the government admitted in its appeal brief that the deposition transcripts were not made available to the grand jury. The government attempted to justify that fact by characterizing respondent's detailed testimony as "hearsay" and "self-serving," and claiming that "all of the information the defendant contends the Grand Jury should have received from his civil deposition was conveyed to the Grand Jury by other witnesses." *Id.* at 22, 23, 30, 35 and 41. It is curious that this information would have been presented to the grand jury by the government if it so vehemently believed that it was inadmissible, irrelevant, perjurious and hearsay, among other things. The government's investigation itself belies its claim of the "irrelevance" of respondent's deposition testimony. It was the government that gathered all of this exculpatory evidence while conducting its investigation in this case. Moreover, on October 14, 1988, three (3) days before trial was to commence, the government submitted its proposed stipulations to respondent seeking the admission of each of the five (5) volumes of respondent's deposition transcript. Add. ex. N. These proposed government stipulations in part stated that the parties agreed that the deposition transcripts were "admissible at trial in the above-styled matter . . . . " *Id.*

For whatever reason, the grand jury was deprived of evidence, clearly known to the government at the time of

the grand jury investigation, which bore directly upon respondent's knowledge and intent to support the subject criminal charges. Review by the prosecutor of respondent's tax returns would have revealed the source of the information on the income statements. But the applicable portions of the returns were neither presented nor explained to the grand jury. A review of respondent's financial statements from 1975 would have revealed a systematic and consistent quarterly reporting of the information which the government claimed was inaccurate in 1984. A review of portions of the deposition transcript would have revealed the testimony of respondent explaining the accuracy of the financial statements identified in the indictment.

The government's papers in the court of appeals, unlike its positions taken in the trial court and in this Court, claimed that the substantial exculpatory evidence withheld was irrelevant under its "theory of the case." Apparently, the government's justification for failing to present overwhelming evidence negating respondent's guilt was premised entirely upon its view of relevance.[4]

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[4] The volume of the exculpatory evidence in the possession of the prosecution in this case should not serve as a basis for the prosecution justifying non-disclosure of that evidence to the grand jury. The government could have disclosed this evidence by a number of methods. For example, the case agent was David Brechwald, an agent with the Federal Bureau of Investigation, who is a certified public accountant. Brechwald could have reviewed and analyzed a great deal of the subject material and presented it in summary form to the grand jury.

Tying its "theory of the case" to its subjective view of relevance, the government reasoned that it would have "been a waste of time" and a "fruitless gesture" to present exculpatory evidence to the grand jury because it would not have understood that evidence:

> The grand jury would not have known or understood the relevance of those documents without knowing the defendant's theory of the case, so the presentation of those documents would have been a fruitless gesture. Had the government used a witness to discuss all those documents, line by line, it would have taken forever and been a waste of time, as the grand jury still would not have known or understood how those documents fit into the case, without knowing the defendant's theory of the case.

Gov't Resp. Br. on App. at 7. Though this reasoning provides an expedient means by which the government may attain its goals, it is legally unsupportable.[5] Because virtually all the evidence at issue related to a lack of

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[5] It is not possible for respondent to address fully petitioner's inconsistent arguments relating to whether or not it presented substantial exculpatory evidence in its possession to the grand jury. The trial and appellate courts denied respondent's motions seeking the disclosure of additional grand jury testimony. Thus, respondent has never had access to the entire grand jury transcript in order to address comprehensively issues presented, and respond to claims and arguments made by the government. The government, the trial court, and the court of appeals had, and this Court has, the benefit of the entire grand jury transcript. Clearly, the trial and appellate courts did not agree with petitioner's assertion that the exculpatory evidence at issue was, in some form, presented to the grand jury.

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requisite intent to commit the crime which was the subject of the grand jury's investigation, the exculpatory nature of this evidence would apply regardless what theory of defense might have been adopted. It is also directly contrary to representations made by the prosecution to the district court. In a letter dated September 23, 1988, which accompanied the grand jury transcripts being submitted to the court for *in camera* review, the United States Attorney stated "the government believes that rather than requiring that all possibly exculpatory evidence be produced for the Grand Jury, the Page case only requires that substantially exculpatory evidence be produced. As the Court can see from the complete

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In its appeal papers, the government claimed that grand jury testimony dealt with areas of evidence which were found to be exculpatory and not presented to the grand jury. The government declined to quote such alleged portions of the grand jury transcript, however, claiming that to do so "would further play into the defendant's hand [sic] and give him more of what he is not entitled to." Gov't Resp. Br. on App. at 9. The government then stated that it "has complete faith in the Court's assessment of the grand jury testimony and would expect the defendant to have the same." *Id.* The faith which petitioner asked respondent to have in the court of appeals' assessment of the grand jury testimony (as opposed to respondent's participation in the process by informed review, and assessment of whatever was, or was not, presented to the grand jury) is similar to petitioner's claim that prosecutors would not seek indictments where the chances of conviction are remote and the suggestion that this provides an adequate check on prosecutorial misconduct. If this were the case, there would have been no need for inclusion of the grand jury clause in the Fifth Amendment.

transcripts, the government went beyond that requirement . . . . " App. I, ex. N, Oct. 3, 1988 (emphasis in original). This was not true.

Regardless of theories of defense or prosecution, an essential element of a section 1014 violation requires that the government establish that the defendant made the false statements knowingly. The trial court concluded that the substantial exculpatory evidence which the prosecutors had in their possession but elected not to present to the grand jury related directly to "the issue of Defendant's intent to make materially false statements upon which the banks would rely." Pet. App. 24a. This is true under any theory.

SUMMARY OF ARGUMENT

A. Though the grand jury's function is investigative, its mission is also to clear the innocent no less than it is to bring those who may be guilty to trial. It serves as a check on the power of government and thereby protects citizens against arbitrary and oppressive governmental action. The grand jury must therefore be both independent and informed. If a grand jury does not have access to all relevant evidence, its judgment cannot be truly informed. When the government usurps the grand jury's function by withholding from it substantial exculpatory evidence negating an essential element of the offense charged, the grand jury's independence is compromised. As this Court has frequently recognized, a grand jury cannot fulfill its function unless it is afforded the opportunity to inquire into all relevant information to find if a crime may have been committed.

The burdens which petitioner claims would flow from the imposition of a duty on the prosecutor to disclose substantial exculpatory evidence negating guilt to the grand jury are overstated. The Department of Justice, a number of federal courts, and approximately one-fourth of the states have, for a number of years, imposed such a duty on prosecutors. No adverse impact has flowed from this practice; but certainly targets of grand juries have justly been freed because the grand jury was informed of substantial exculpatory evidence negating guilt. Moreover, the government in this case never claimed that this duty was burdensome. It repeatedly claimed that it complied with its duty, and even *went beyond* the requirements of *Page*.

B. The government contends that the "rule" established by the Tenth Circuit is that prosecutors are required to present exculpatory evidence to grand juries. No such "rule" has been established in the Tenth Circuit either in this case or in any other case. Moreover, no such "rule" has been announced by any of the circuit courts of appeals. Here, the prosecutor was knowingly in possession of *substantial* exculpatory evidence negating a fundamental element of the offense charged. No circuit has held that, under such circumstances, the prosecutor is not bound to present that evidence to the grand jury. Regardless of theories of defense or prosecution, the prosecutor must be aware of the essential elements of the crimes for which he is seeking an indictment. Violations of 18 U.S.C. § 1014 include as elements (i) that the statements made to the bank were false as to material facts, and (ii) that the defendant made the false statements knowingly. *See, e.g., United States v. Smith*, 838 F.2d 436, 439 (10th Cir. 1988).

Where prosecutors have in their possession, but elect not to present to the grand jury, substantial exculpatory evidence which relates directly to the target's intent to make materially false statements, that evidence must be presented to the grand jury. This is true regardless of what theory of defense may exist, or may ultimately be adopted by a defendant.

C. The court of appeals' affirmance of the dismissal of the indictment was proper. A district court may invoke its supervisory power to dismiss an indictment for prosecutorial misconduct in the grand jury proceedings where that conduct prejudices a defendant. Upon an analysis of the withheld evidence, a thorough review of the grand jury transcript, and following an evidentiary hearing, the trial court concluded that "the government had in its possession substantial exculpatory information that would have assisted the grand jury in fairly evaluating intent within the context of all the relevant evidence. . . . The absence of this substantial exculpatory evidence on perhaps the most crucial element of the crime charged renders the grand jury's decision to indict gravely suspect." Pet. App. 26a.

The prosecutors were aware of the substance of the evidence in their possession which was withheld from the grand jury. The government had obtained the specific evidence as a part of its investigation; it was not provided to the government by respondent's counsel. At the court of appeals, the government attempted to justify its withholding of this evidence based on the claim that it was inconsistent with its "theory of the case," and stated that it would have "been a waste of time" and a "fruitless gesture" to present evidence negating an element of the

offense to the grand jury because it "would not have known or understood the relevance of those documents without knowing the defendant's theory of the case . . . . " Gov't Resp. Br. on App. at 7. Exculpatory evidence would never fit within a prosecutor's "theory" of a case. The finding of intent to commit a criminal act is a determination the grand jury must make in deciding whether probable cause exists. Absent this substantial and relevant exculpatory evidence on a crucial element of the crime charged, the grand jury's decision to indict was gravely suspect and dismissal was thus appropriate.

ARGUMENT

A. The Grand Jury Performs the Dual Functions of Determining Whether There is Probable Cause and Protecting Citizens From Government Overreaching – The Presentation of Substantial Evidence Negating Guilt is Fully Consistent With These Functions and Imposes no Significant Burden on the Courts or the Government.

Petitioner devotes a significant portion of its brief to the functions of the grand jury. It claims that the requirement that prosecutors present exculpatory evidence to the grand jury is incompatible with these functions, and that imposition of such a requirement would result in virtually overwhelming burdens being imposed upon the courts and prosecutors. Pet. Br. at (I), 9, 10, 16 n. 4 and 17.[6] Petitioner

[6] Petitioner repeatedly claims that the "rule" established in *United States v. Page*, 808 F.2d 723 (10th Cir.), *cert. denied*, 482

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has apparently overlooked the fundamental principles that the grand jury not only determine whether there is probable cause, but also that it free the innocent and protect citizens from government overreaching.

The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . . " This constitutional guarantee derives from the traditional English institution of the grand jury which English settlers brought to the American colonies. *See Costello v. United States*, 350 U.S. 359, 362 (1956). Originally used to aid the Crown in detecting and prosecuting crimes, the English grand jury came to be perceived as a shield for the accused against baseless accusations. 1 S. Beale & W. Bryson, *Grand Jury Law & Practice*, § 1:03, p. 12 (1986). The function of the grand jury ultimately became:

> [t]o preserve the innocent from the Disgrace and Hazzards which Ill men may design to bring

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U.S. 918 (1987), and followed by the trial and appellate courts in this case, is that the government must present exculpatory evidence to the grand jury. This is an incomplete, inaccurate, and misleading characterization of the duty which has been recognized by a number of courts, the Tenth Circuit among them. No court has held that a prosecutor has the duty to present merely exculpatory evidence to a grand jury. *See* part B, *infra*. In all instances, courts require that the prosecutor know of or possess the exculpatory evidence as a result of his investigation, and that the evidence be substantial exculpatory evidence. The court of appeals specifically recognized that the prosecutor is not required to "ferret out and present every bit of potentially exculpatory evidence . . . . " Pet. App. 5a, citing *Page*, 808 F.2d at 728. Moreover, dismissal is not appropriate unless the withheld exculpatory evidence is so substantial that it negates the target's guilt or renders the grand jury's decision to indict gravely suspect.

> them to, out of Malice, or through Subordination or other Sinister Ends; for so tender is the Law, of the Reputation and Life of a Man, that it will not suffer the one to be sullied . . . and the other endangers by a Trial, until first the Matter and Evidence against him have been scann'd, examined, and found by a Grand Jury, upon their Oaths, against him.

Id. at 9, *quoting* H. Care, English Liberties Of The Free-Born Subject's Inheritance, 252 (4th ed. 1719).

Against this background, the framers incorporated the requirement of indictment by grand jury into the Bill of Rights. Since then, this Court has recognized the dual functions of the grand jury. The grand jury serves "as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity." *Stirone v. United States*, 361 U.S. 212, 218 n.3 (1960). In *Wood v. Georgia*, 370 U.S. 375 (1962), the Court held that the grand jury has historically functioned "as a primary security to the innocent against hasty, malicious and oppressive persecution" serving "the invaluable function in our society of standing between the accuser and accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *Id.* at 390. The grand jury's function of standing "between the accuser and the accused" has been referred to as "the most valuable function of the grand jury . . . ." *Hale v. Henkel*, 201 U.S. 43, 59 (1906); *Hoffman v. United States*, 341 U.S. 479, 485 (1951). "The very purpose of the requirement that a man be indicted by a grand jury is to

limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone*, 361 U.S. at 218. *See also Costello*, 350 U.S. at 362.

The mission of the grand jury "is to clear the innocent, no less than to bring to trial those who may be guilty." *United States v. Dionisio*, 410 U.S. 1, 16-17 (1973). The grand jury serves as a check on the power of the government and is thereby "a protector of citizens against arbitrary and oppressive governmental action." *United States v. Calandra*, 414 U.S. 338, 343 (1974). The grand jury must therefore be both "independent and informed." *Wood v. Georgia, supra*, 370 U.S. at 390. "To be independent and informed, the grand jury must be able to obtain all relevant evidence, since only then can its judgment truly be informed." *United States v. Flomenhoft*, 714 F.2d 708, 711 (7th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984). In *United States v. R. Enterprises, Inc.*, 111 S. Ct. 722 (1991), the Court recently summarized the function of the grand jury as follows:

> The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush. "A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.' "

Id. at 726 (*quoting Branzburg v. Hayes*, 408 U.S. 665, 701 (1972)).

Though prosecutors have wide latitude in evidentiary presentations made to grand juries, *see United States v. Mechanik*, 475 U.S. 66, 84 (1986) (O'Connor, J., concurring), they do not have unfettered discretion. Rule 6 of the Federal Rules of Criminal Procedure and the courts' supervisory powers guide prosecutors and prevent them from infringing upon a grand jury's independence and from presenting evidence to a grand jury in deliberately misleading ways. *Mechanik*, 475 U.S. at 74-75; *United States v. Udziela*, 671 F.2d 995, 998-99 (7th Cir.), *cert. denied*, 457 U.S. 1135 (1982) (collecting cases where indictment dismissed). Thus, a prosecutor may not manipulate the process to ensure that all witnesses testify in a consistent manner. *Mechanik*, 475 U.S. at 74. Likewise, the prosecutor may not manipulate a witness' testimony or knowingly participate in a misleading and inaccurate grand jury presentation. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 260-61, 262 (1988).

The rule that a prosecutor has the duty to reveal to the grand jury substantial exculpatory evidence discovered during the course of an investigation is consistent with, and furthers, these principles. Though the grand jury is vested with broad investigatory authority, in reality it relies almost exclusively upon the evidence presented by the prosecutor. "Although the grand jury may itself decide to investigate a matter or to seek certain evidence, it depends largely on the prosecutor's office to secure the evidence or witnesses it requires." *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 430 (1983). Certainly the grand jury could not be truly independent

and informed if the prosecutor were allowed to conceal substantial exculpatory evidence, thus leaving the grand jury with a false impression rather than an informed one. As counsel for petitioner succinctly stated before authoring the certiorari papers in this case, "[c]oncern has been expressed that the prosecutor exercises too much control over the modern grand jury, which may become nothing more than a rubber stamp. Requiring the prosecutor to inform the grand jury of evidence that may exonerate the accused strengthens the grand jury's ability to screen out weak cases." 1 S. Beale & W. Bryson, *Grand Jury Law & Practice*, § 6:03, p. 13 (1986).

The grand jury's independence is compromised if, by the prosecutor's manipulation, it merely functions as an arm of the prosecution. The grand jury must be apprised of all relevant evidence not only so that its judgment may be truly informed, but in order to facilitate its ability to inquire pursuant to its investigatory function. Requiring the prosecutor to disclose substantial evidence in his or her possession which is exculpatory in nature does not "invite the grand jury to move from its limited screening role to the broader role reserved for the petit jury," as petitioner contends. Pet. Br. at 18. Imposing a duty on the prosecutor to present such evidence to the grand jury allows the grand jury to perform its screening role. Absent the disclosure of such evidence, the grand jury is not in fact screening instances where probable cause exists from those where it does not, but is instead making this determination based upon an incomplete and misleading examination of evidence.

Petitioner's claim that presentation of substantial exculpatory evidence to the grand jury is unduly

burdensome and outweighed by any benefits is contrary to the facts. For many years, district and circuit courts have required prosecutors who are aware of substantial exculpatory evidence negating guilt to present that evidence to the grand jury. Yet, the "system" which petitioner seeks to protect has not grounded to a halt or evidenced negative side effects of any type throughout this period.[7] To the contrary, courts have efficiently and effectively enforced violations of the prosecutor's duty to present substantial exculpatory evidence to the grand jury and have dismissed indictments in appropriate cases. *E.g., United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974); *United States v. Isgro*, 751 F. Supp. 846 (C.D. Cal. 1990); *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979); *United States v. Phillips Petroleum Co.*, 435 F. Supp. 610 (N.D. Okla. 1977); *United States v. Braniff Airways, Inc.*, 428 F. Supp. 579 (W.D. Tex. 1977); *United States v. DeMarco*, 401 F. Supp. 505 (C.D. Cal. 1975), *aff'd on other grounds*, 550 F. 2d 1224 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977). Moreover, approximately one-fourth of the states

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[7] Since the court of appeals' decision in this case, the Tenth Circuit affirmed a trial court's denial of a dismissal motion premised upon a defendant's claim that substantial exculpatory evidence was withheld from the grand jury. *United States v. Reid*, 911 F.2d 1456, 1459-60 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 990 (1991). The court of appeals expressly recognized that evidence which could fairly be characterized as "exculpatory" was withheld from the grand jury, but concluded that the defendant could not "meet the difficult burden of showing that the government's failure to disclose [the witness'] complete criminal history had any affect on the grand jury's decision to indict." *Id.* at 1460.

have recognized that in appropriate circumstances the prosecutor has a duty to inform the grand jury of exculpatory evidence. 1 S. Beale & W. Bryson, *Grand Jury Law & Practice*, § 10:09, p. 38 (1986). This obligation is recognized in the American Bar Association's Standards for Criminal Justice, which state that "[n]o prosecutor should knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt." *American Bar Association Standards For Criminal Justice*, § 3-3.6(b) (1980).

The Department of Justice itself has long required that "when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor *must present* or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person." United States Attorneys' Manual ¶ 9-11.233, at 18 (1990) (emphasis added). It is difficult to accept petitioner's present concerns about the "costs to the system" which would flow from the imposition of a duty on prosecutors such as that recognized in the Tenth Circuit when the Department of Justice itself imposes such a duty on its attorneys. The very practice which petitioner claims will result in improper mini-trials invasive of the grand jury's function is, and has been, followed by the government without adverse impact on the criminal justice system or notable expression of any difficulty in interpreting or applying this rule.

The petitioner's conduct in the instant case belies its claims that the court of appeals' rule is "sweeping, burdensome, and intrusive" and that "[t]he marginal benefits, if any, that would flow from that regime would come

at far too high a cost." Pet. Br. at 28 and 25, respectively. Petitioner never raised the issue presented to this Court in the trial or appellate courts. Petitioner never contended that the duty of a prosecutor, first recognized in the Tenth Circuit in *Page*, was unduly burdensome or violative of any grand jury functions or constitutional principles. Indeed, in the district court and on appeal, petitioner unequivocally embraced the very principles which it now asks this Court to review and reject. Petitioner consistently asserted that it had fully complied with its obligations under controlling authorities of the Tenth Circuit and this Court by supplying exculpatory evidence to the grand jury. For example, in an appeal brief petitioner stated:

> The government has acknowledged that it has certain responsibilities under the case of United States v. Page, 808 F.2d 723 (10th Cir. 1987), and that [sic] includes a duty to not withhold substantial exculpatory evidence from a grand jury if such exists . . . . The government would contend that although it may not have been familiar with the Page case by name, it was familiar with and complied with the principles stated in the case.

Gov't Resp. Br. on App. at 9-10.[8]

Petitioner's position throughout this litigation is that it has complied with its duty to disclose substantial evidence which directly negates the guilt of a subject of the

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[8] Perhaps petitioner's purported familiarity and compliance with the principles enunciated in *Page* was based upon its familiarity with its obligations as set forth in the United States Attorneys' Manual.

investigation. On one occasion petitioner advised the trial court that it "went beyond that requirement." The government never took issue with its obligation or with the holding in *Page*, but instead challenged whether the evidence was substantial or exculpatory.

> The government contends that Page, supra, requires the government to present to the grand jury evidence which is clearly substantially exculpatory. The government has shown that the evidence which the defendant argues is exculpatory is neither substantial nor clearly exculpatory; thus, the government did not err in failing to present it to the grand jury, and the trial court did err in dismissing the indictment.

Gov't Resp. Br. on App. at 11. And in its Brief in Chief to the Tenth Circuit, petitioner hastened to add that the court should follow its prior decision, stating "[t]he government would assert that this Court should follow the holding of Page . . . . " Gov't Br. on App. at 43. It was in the Petition for Certiorari that petitioner first challenged the rule, and devised the various administrative and practical burdens which compliance with the rule allegedly imposes.

B. The Substantial Nature of the Exculpatory Evidence Distinguishes This Case From Decisions Rendered by Other Circuits.

No Circuit Court of Appeals has ever held that the failure to present merely exculpatory evidence to a grand

jury requires dismissal of an indictment under the exercise of the court's supervisory power. The government cites three decisions which it contends "have squarely rejected any rule that the prosecutor must present exculpatory evidence to a grand jury." Pet. Br. at 19 n. 6.[9] Neither the Tenth Circuit, nor any other court, has adopted such a rule. The court of appeals' decision here was based upon the government's breach of its duty to present to the grand jury *substantial* exculpatory evidence obtained by the prosecution in the course of its investigation. That rule was first announced in the Tenth Circuit in *United States v. Page*, 808 F.2d 723 (10th Cir.), *cert. denied*, 482 U.S. 918 (1987). The *Page* court stated:

> [A]lthough a prosecutor need not present all conceivably exculpatory evidence to the grand jury, it must present evidence that clearly negates guilt. . . . Under this standard the prosecutor is not obliged to ferret out and present every bit of potentially exculpatory evidence. But when *substantial* exculpatory evidence is discovered in the course of an investigation, it must be revealed to the grand jury. This promotes judicial economy. If a fully informed grand jury cannot find probable cause to indict, there is little chance the prosecution could have proved guilt beyond a reasonable doubt to a fully informed petit jury.

Id. at 727-28 (citations omitted) (emphasis in original). There is a distinction between the government's obligation when it is in possession of merely "exculpatory" evidence and its duty to disclose *substantial* exculpatory evidence negating guilt. Neither petitioner's argument nor its authorities address this material distinction.[10]

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[9] The Government cites *United States v. Larrazolo*, 869 F.2d 1354 (9th Cir. 1989); *United States v. Hawkins*, 765 F.2d 1482 (11th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986); and *United States v. Adamo*, 742 F.2d 927 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985). None of these cases, however, involved the government's failure to provide *substantial* exculpatory evidence to a grand jury. Nor did these cases involve conduct which rendered the grand jury proceedings fundamentally unfair or infringed upon the exercise of the grand jury's independent judgment.

[10] The only reference in petitioner's brief to "substantial" in connection with the Tenth Circuit's rule, found at pages 9 and 26 of its brief, is the claim that the "costs" of the rule would not be reduced by defining the prosecutor's duty "as applying only to 'substantial' exculpatory evidence." *Id.* at 26. Petitioner claims that "such a standard would be extremely difficult for prosecutors to follow or courts to apply." *Id.* at 9. Courts and counsel make such determinations virtually every day. Standards are commonly defined by use of the term "substantial." For example, this Court recognized that the prejudice inquiry involved in a determination of whether dismissal is warranted for conduct such as is involved here focuses on whether the conduct "may have influenced *substantially* the grand jury's decision to indict . . . . " *Bank of Nova Scotia*, 487 U.S. at 259 (emphasis added). Appeals of administrative law decisions are considered under a "substantial evidence" standard. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Courts often determine the constitutionality of legislative classifications by analyzing whether the legislation is "substantially related to serve an important governmental interest." *Craig v. Boren*, 429 U.S. 190, 197 (1976). Likewise, disability benefits may be denied should a claimant be engaged in "substantial gainful activity," 20 C.F.R. 404.1575, and a district court will not review a bankruptcy court decision confirming a plan of reorganization if the challenged plan is "substantially consummated." 11 U.S.C. § 1101(2). Additional taxes may be assessed

(Continued on following page)

In *United States v. Adamo*, 742 F.2d 927 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985), the court did not address the legal effect of the government's knowing refusal to provide the grand jury with *substantial* exculpatory evidence negating guilt. The court considered only the effect of the government's failure to present merely "exculpatory" evidence to the grand jury. The allegedly exculpatory evidence in *Adamo* was not "substantial" because it related to issues of credibility and was subject to different interpretations. In addition, perjured testimony in *Adamo* was discovered to be false after it had been presented to the grand jury.

The government's reliance upon *United States v. Hawkins*, 765 F.2d 1482 (11th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986), is similarly flawed. *Hawkins*, like *Adamo*, is inapposite because it does not address the government's duty when in possession of *substantial* exculpatory evidence. As in *Adamo*, the *Hawkins* court was not called upon to determine the effect of a prosecutor's failure to

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should a taxpayer make a "substantial understatement" of income for a given year. 26 U.S.C. § 6661(b)(1). Attorney conflict of interest rules are resolved based upon a " substantially related" standard. Rule 1.10(b) of the ABA Model Rules of Professional Conduct, adopted in Oklahoma as Oklahoma Rules of Professional Conduct, Rule 1.10(b), Okla. Stat. tit. 5, chapter 1, app. 3-A (1991).

reveal to the grand jury *substantial* exculpatory evidence. In fact, the *Hawkins* court rejected the defendant's arguments that the withheld evidence was in any way exculpatory. The court specifically stated that the defendant's arguments were based on speculation, *id.* at 1488, and concluded that the defendant's "unsupported allegations [were] irrelevant and without merit." *Id.*

The government's reliance on *United States v. Larrazolo*, 869 F.2d 1354 (9th Cir. 1989), is also misplaced. *Larrazolo* does not address the effect of a prosecutor's failure to present *substantial* exculpatory evidence to the grand jury. The evidence in *Larrazolo* may not have been exculpatory at all (let alone substantial exculpatory evidence) because it was subject to different interpretations. Unlike the present case in which prejudice was found to exist, the *Larrazolo* court noted that the defendant had not met the standard of prejudice required by *Bank of Nova Scotia*, *id.* at 1359-60, stating that "[t]he possibility of a negative inference from the evidence shows that defendants might have benefitted from the absence of the evidence." *Id.* at 1360.

The government notes that two circuits have held that, in *normal circumstances*, a federal prosecutor is not required to submit "exculpatory" evidence to the grand jury. Pet. Br. at 19 n. 5. The decisions in those cases, however, are not relevant to the issue presented here. First, this case is not "normal" because the exculpatory evidence in the government's possession was substantially exculpatory on the issue of criminal intent, a necessary element of the government's burden to prove probable cause that respondent may have committed a crime. Second, the evidence in the cases cited by the

government did not involve prosecutorial conduct which tainted the grand jury's charging decision.

In *United States v. Rivera-Santiago*, 872 F.2d 1073 (1st Cir.), *cert. denied*, 492 U.S. 910 (1989), the court affirmed the district court's refusal to dismiss an indictment, stating that "[t]he prosecutor before a grand jury is not *normally* under a duty to disclose exculpatory evidence." *Id.* at 1087 (emphasis added). The *Rivera-Santiago* court's use of the qualifying term "normally" suggests a recognition that extraordinary situations may occur in which the prosecutor is charged with a duty to present exculpatory evidence to the grand jury. Unlike the present case, the record in *Rivera-Santiago* was devoid of evidence that prosecutorial conduct distorted the integrity of the grand jury process. The court's decision in *Rivera-Santiago* is also supported by other circumstances not found in the present case. Specifically, the court noted that the claim of governmental misconduct had never been presented to the district court, that the alleged perjury did not relate to the defendant's indictment but, rather, had been committed in a previous case, and that the defendant's conviction on the charges rendered the error harmless under the *Mechanik* standard. *Id.* at 1088.

In *United States v. Vincent*, 901 F.2d 97 (8th Cir. 1990), the Eighth Circuit recognized that a prosecutor is not obligated to present exculpatory evidence to a grand jury. Unlike the evidence in the present case, however, none of the allegedly excuplatory evidence considered by the *Vincent* court was relevant to, or negated, an element of the crime being investigated (possession of a firearm). In fact, the *Vincent* court found that the element of "possession" had been established by uncontroverted facts. *Id.* at 98 n.

1. Finally, the court's decision was in part based on the fact that the defendant was convicted of the crime, thus rendering any error in the grand jury proceedings "harmless." *Id.* at 99.[11]

The government acknowledges that the Second and Seventh Circuits have recognized that federal prosecutors are charged with a duty to sumbit *substantial* exculpatory evidence to the grand jury. In *United States v. Ciambrone*, 601 F.2d 616 (2d Cir. 1979), the Second Circuit addressed the defendant's contention that the prosecutor failed to reveal to the grand jury that the defendant's perjured testimony at a prior trial was coerced by threats against his life. The court noted the significant fact that the defendant and his attorney had rejected the government's invitation to appear before the grand jury to assert that claim. The court rejected the defendant's arguments because there was nothing in the record to indicate that the government had misrepresented the facts. *Id.* at 624. The Second Circuit expressly stated, however, "that where a prosecutor is aware of any *substantial* evidence negating guilt he should in the interest of justice, make it known to the grand jury, at least *where it might reasonably be expected to lead the jury not to indict.*" *Id.* at 623

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[11] The government's brief makes no reference to the Eighth Circuit's prior decision in *United States v. Civella*, 666 F.2d 1122 (8th Cir. 1981), where the court recognized the distinction between normal and extraordinary instances of government conduct in connection with its duty to disclose evidence to the grand jury. In *Civella*, the court stated that "[t]he prosecutor is *normally* not under a duty to disclose facts which would be the basis of a *defense* at trial." *Id.* at 1127 (emphasis added).

(emphasis added). The Second Circuit stated that "the prosecutor's right to exercise some discretion in the presentation of evidence to a grand jury does not entitle him to mislead it or to engage in fundamentally unfair tactics before it." *Id.*

In *United States v. Flomenhoft*, 714 F.2d 708 (7th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984), the court recognized the distinction between normal circumstances involving merely exculpatory evidence and extraordinary instances of conduct involving the concealment of *substantial* exculpatory evidence. The court stated:

> This Court's careful scrutiny of the alleged "exculpatory evidence," which the government failed to present to the first grand jury, causes us to echo the sentiments of [the trial judge] who noted " . . . there is a big difference between exculpatory evidence and evidence that may be impeaching in some important or unimportant respect." . . . Nonetheless, even assuming arguendo that this exculpatory evidence meets the clearly exculpatory standard enunciated in *United States v. Dorfman*, 532 F. Supp. 1118, 1133 (N.D. Ill. 1981) (" . . . while prosecutors need not present to the grand jury all circumstances which might be considered exculpatory, they must present evidence which clearly negates the target's guilt."), this is not a case where the government failed to present the exculpatory evidence to the grand jury.

Id. at 712 (citation omitted).[12]

In *United States v. Wilson*, 798 F.2d 509 (1st Cir. 1986), the court specifically recognized an exception to the general rule relied upon by the government and stated "that an obligation to disclose 'should' exist where the prosecutor is aware of substantial evidence negating guilt . . . . " *Id.* at 517 n. 2. Recognition of such an obligation resulted in the dismissal of an indictment in *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979). In *Gold*, the court stated:

> When a prosecutor refuses to present exculpatory evidence, he, in effect, destroys the existence of an independent and informed grand jury. As this court has already said, the constitutional guarantee that no person shall be held to answer for a capital or otherwise infamous crime, unless on the presentment or indictment of a grand jury, presupposes an investigative body acting independently of either the prosecuting attorney or the judge.

Id. at 1353.

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[12] In *Matter of the Special April 1977 Grand Jury*, 587 F.2d 889 (7th Cir. 1978), the Seventh Circuit had previously recognized the government's duty to present *substantial* exculpatory evidence to the grand jury. The duty was recognized in relation to the express terms of the United States Attorney's Manual, which mandates disclosure of such evidence. The court affirmed the denial of a dismissal motion, finding that the alleged exculpatory evidence was not substantial. *Id.* at 893.

The duty first recognized by the Tenth Circuit in *Page* and applied here, was well expressed in *United States v. Dorfman*, 532 F. Supp. 1118 (N.D. Ill. 1981):

> Failing to present evidence which exculpates the target to the grand jury clearly violates this constitutional duty of the prosecutor to remain fair, and ensure that "justice shall be done."
>
> * * *
>
> Giving prosecutors untrammelled freedom to pick and choose which evidence they will present to a grand jury would make a mockery of their constitutional duty of fairness, and render the grand jury meaningless as a check on prosecutorial abuse. Prosecutors should not be permitted to mislead the grand jury through selective presentation of evidence.
>
> * * *
>
> Accordingly, while prosecutors need not present to the grand jury all circumstances which might be considered exculpatory, they must present evidence which clearly negates the target's guilt.

Id. at 1132-33 (citations omitted).

In *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974), the Ninth Circuit held that an indictment, based partially on perjured testimony, should have been dismissed. The court noted that, because the prosecutor wields great power and authority over the grand jury process, *id.* at 785, "there is a correlative duty . . . not to permit a person to stand trial when he knows that perjury permeates the indictment." *Id.* The court stated:

> Whenever the prosecutor learns of any perjury committed before the grand jury, he is under a

> *duty* to immediately inform the court and opposing counsel – and if the perjury may be material, also the grand jury – in order that appropriate action may be taken.

Id. at 785-86 (emphasis added). The court based its decision "on a long line of cases which recognize the existence of a duty of good faith on the part of the prosecutor with respect to the court, the grand jury, and the defendant." *Id.* at 786.

In *United States v. Recognition Equipment Inc.*, 711 F. Supp. 1 (D.D.C. 1989), the court recognized that the government is under an express duty to submit substantial exculpatory evidence to the grand jury. In denying the defendant's motion for production of the grand jury transcript based on alleged irregularities in those proceedings, the court stated:

> [I]t is appropriate that an indictment may be dismissed only when the prosecutor's misconduct has "substantially influenced the grand jury's decision to indict, or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." . . . *This is not to say that the prosecution may hide evidence that clearly negates guilt from the grand jury – it may not* . . . . However, an indictment may be dismissed only when the misconduct has clearly infringed on the grand jury's ability to evaluate whether the evidence establishes probable cause.

Id. at 12 (emphasis added) (citations omitted). The government should present substantial evidence to the grand

jury "if it is of such quality that the prosecutor has good reason to believe it could lead the jury not to indict." *United States v. North*, 708 F. Supp. 370, 371 (D.D.C. 1988).

Petitioner sought certiorari claiming that the question presented was "[w]hether an indictment may be dismissed because the government failed to present exculpatory evidence to the grand jury." This is how petitioner has framed the question presented in its brief as well. Consistent with this mischaracterization of the holding of the court of appeals, petitioner has consistently referred to the "rule" at issue as being one "that mandates the disclosure of exculpatory evidence to the grand jury . . . ." Pet. Br. at 17. No such rule exists in the Tenth Circuit. Nor does any such rule exist in any of the courts of appeals. Petitioner's conflict among the circuits is illusory. Virtually all the courts of appeals have held that prosecutors are not generally required to present exculpatory evidence to the grand jury. The three courts of appeals which petitioner relies upon as having rejected a rule such as that imposed here by the Tenth Circuit were not considering cases in which the prosecutor concealed *substantial* exculpatory evidence negating guilt. The decisions cited by petitioner as conflicting with the rule announced in the Tenth Circuit (*United States v. Larrazolo*, 869 F.2d 1354 (9th Cir. 1989); *United States v. Hawkins*, 765 F.2d 1482 (11th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986), and *United States v. Adamo*, 742 F.2d 927 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985)) do not conflict with that rule. Those cases simply did not address situations such as that presented here where a prosecutor is aware of substantial exculpatory evidence negating guilt

but fails to present it to the grand jury, thus rendering the grand jury's decision to indict gravely suspect.[13]

C. The Tenth Circuit's Standard Requiring Prosecutors to Present Substantial Exculpatory Evidence Which Clearly Negates a Target's Guilt is Consistent With the Court's Exercise of its Supervisory Powers.

Petitioner claims that "[t]he court of appeals' holding that an indictment may be challenged because of the prosecutor's failure to disclose exculpatory evidence to the grand jury cannot be reconciled with the principles underlying *Costello* and *Calandra*."[14] Pet. Br. at 17. Petitioner's reading of *Calandra* and *Costello* ignores this Court's decision in *Bank of Nova Scotia* and, if taken at face value, renders the decision in *Bank of Nova Scotia* meaningless. As is discussed in greater detail below, this Court in *Bank of Nova Scotia* expressly recognized the propriety of dismissal of an indictment, pursuant to a

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[13] This Court has recognized that where certiorari was granted for a conflict between the circuits, but further review demonstrates that a conflict is nonexistent, the writ may be dismissed as improvidently granted. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 78-79 (1955); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-93 (1923).

[14] Once again, petitioner mischaracterizes the court of appeals' holding. The Tenth Circuit did not hold that an indictment may be challenged because of the prosecutor's failure to disclose exculpatory evidence to the grand jury. No court has so held.

court's supervisory power, where "there was any misconduct by the prosecution that otherwise may have influenced substantially the grand jury's decision to indict, or whether there is grave doubt as to whether the decision to indict was so influenced." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 259 (1988).

In *United States v. Fulmer*, 722 F.2d 1192 (5th Cir. 1983), the Fifth Circuit discussed the standard to be applied by the district court in considering whether dismissal of an indictment on grounds of government misconduct should be with or without prejudice. After observing that dismissal of an indictment with prejudice represents an extreme sanction which should be applied only in extraordinary situations, the court stated:

> For this reason, we have held that a district court may dismiss an indictment with prejudice only where it has been shown that governmental misconduct or gross negligence in prosecuting the case has actually prejudiced the defendant.

Id. at 1195.

In *Fulmer*, the district court dismissed the indictment with prejudice because of various "blunders" committed by the government before the grand jury. The case involved the presence before the grand jury of an FBI agent who was not a sworn witness and thus was not authorized to be present. The *Fulmer* court properly concluded that the government's "ineptitude" in handling the case was not so grossly negligent as to bar further prosecution. *Id.* In so holding, the court recognized the

issue as being one of "actual prejudice," whether caused by governmental misconduct or gross negligence.

This Court addressed the issue of the prejudice which must be shown as a predicate to the district court's exercise of its supervisory powers to dismiss an indictment on the basis of prosecutorial misconduct in *Bank of Nova Scotia*. There, the Court affirmed the Tenth Circuit's determination that the prosecutorial misconduct involved was insufficient to warrant dismissal of the indictment. The Tenth Circuit's opinion, reported as *United States v. Kilpatrick*, 821 F.2d 1456 (10th Cir. 1987), *aff'd*, 487 U.S. 250 (1988), concluded in part that prejudice to the defendant must be shown before a court can exercise its supervisory powers to dismiss an indictment on the basis of prosecutorial misconduct. 821 F.2d at 1473-75.

In *Bank of Nova Scotia*, the Court initially addressed the "standard of prejudice" which should be applied by district courts where dismissal of an indictment is requested prior to the conclusion of the trial. The Court stated that where dismissal is sought for non-constitutional error, it would adopt the standard articulated by Justice O'Connor in her concurring opinion in *United States v. Mechanik*, 475 U.S. 66 (1986):

> Under this standard, dismissal of the indictment is appropriate only "if it is established that the violation substantially influenced the grand jury's decision to indict," or if there is "grave doubt" that the decision to indict was free from the substantial influence of such violations.

Bank of Nova Scotia, 487 U.S. at 256.

Justice Kennedy then proceeded to consider the nature of the government misconduct at issue in that case. The issues essentially involved the alleged misuse of IRS agents, the "mistreatment" of an expert witness for the defense, the defendants' claim that summaries utilized by IRS agents were inaccurate, and the grant of "pocket immunity" to certain grand jury witnesses. *Id.* at 260. The case did not involve a prosecutor's decision to withhold substantial exculpatory evidence from the grand jury.

In considering the prejudicial effect of the misconduct alleged, the Court noted that the incidents occurred "as isolated episodes in the course of a 20-month investigation, an investigation involving dozens of witnesses and thousands of documents." *Id.* at 263. The Court concluded that the violations did not raise a substantial question with regard to the grand jury's decision to charge. The Court further noted that the nature of the errors involved could be remedied by means other than dismissal, such as contempt of court or disciplinary proceedings. *Id.*

In the final paragraph of the decision, Justice Kennedy delivered the Court's ruling as follows:

> We conclude that the District Court had no authority to dismiss the indictment on the basis of prosecutorial misconduct absent a finding that petitioners were prejudiced by such misconduct. The prejudicial inquiry must focus on whether any violations had an effect on the grand jury's decision to indict. If violations did substantially influence this decision, or if there is grave doubt that the decision to indict was

> free from such substantial influence, *the violations cannot be deemed harmless.*

Id. (emphasis added).

The governing standards were presented to the district court in conjunction with the respondent's motion to dismiss. At page 2 of its November 7 Order, the trial court expressly noted that its decision was "guided by the standard of dismissal recently articulated by the United States Supreme Court in *Bank of Nova Scotia* . . . and by the decisions of this Circuit regarding exculpatory evidence." Pet. App. 20a. After a careful analysis of the substantial exculpatory evidence in the possession of the government yet not presented to the grand jury, the district court concluded:

> The information withheld *raises reasonable doubt about the Defendant's intent to defraud.* The absence of this substantial exculpatory evidence on perhaps the most crucial element of the crime charged *renders the grand jury's decision to indict gravely suspect.*

Id. at 26a (emphasis added).

As noted, in *Bank of Nova Scotia* this Court expressly adopted the standard articulated in *Mechanik* finding dismissal of an indictment appropriate where the subject violation substantially influenced the grand jury's decision to indict or if there is "grave doubt" that the decision to indict was free from substantial influence of such violations. The district court's conclusion here was that the absence of the subject exculpatory evidence rendered the grand jury's decision to indict "gravely suspect." This is precisely what *Bank of Nova Scotia* held amounted to

"prejudice." 487 U.S. at 263. *See also United States v. Soberon*, 929 F.2d 935, 939 (3d Cir. 1991) (prejudice requires that the district court establish a violation which substantially influenced the grand jury's decision to indict or that there is grave doubt that that decision was free from such influence).

This is not a case where dismissal of the indictment was ordered merely because of some procedural irregularity before the grand jury. *See, e.g., United States v. Phillips Petroleum Co.*, 435 F. Supp. 610, 618 (N.D. Okla. 1977) ("slightest intrusion of an unauthorized person into a Grand Jury proceeding voids the indictment"); *United States v. Bowdach*, 324 F. Supp. 123 (S.D. Fla. 1971) (FBI agent recalled to play tape recordings to refresh memory of tesifying witness); *United States v. Borys*, 169 F. Supp. 366 (D. Alaska 1959) (mother of child present while child testified). Here, the government infringed upon the grand jury's independent judgment and "render[ed] the grand jury's decision to indict gravely suspect." Pet. App. 26a.

As noted, this Court has expressly recognized that a district court's supervisory power may properly be exercised to dismiss an indictment for non-constitutional error. In *Bank of Nova Scotia*, though the facts did not warrant such a dismissal, the Court suggested that the finding that prosecutors knowingly utilized false or misleading evidence before the grand jury, or caused government agents to testify falsely, might give rise to a finding of prejudice. 487 U.S. at 259-60. These conclusions do not

conflict with *Calandra* or *Costello*.[15] The analysis focuses on the prosecutor's conduct, not the sufficiency or competence of evidence considered by the grand jury. *E.g., United States v. Isgro*, 751 F. Supp. 846, 851-52 (C.D. Cal. 1990); *United States v. Lawson*, 502 F. Supp. 158 (D. Md. 1980); *United States v. Provenzano*, 440 F. Supp. 561 (S.D.N.Y. 1977); *United States v. Phillips Petroleum Co.*, 435 F. Supp. 610 (N.D. Okla. 1977).

The prosecutor's failure to present substantial exculpatory evidence in this case substantially influenced the grand jury's decision to indict, or left grave doubt that the decision to indict was free from such influence.[16]

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[15] In *Costello*, the Court found there were no "persuasive reasons" for exercising the supervisory power to establish a rule overturning a conviction based upon an indictment obtained with hearsay evidence. That cannot be said of this case. *See generally* Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 Mich. L. Rev. 463 (1980).

[16] The district court's conclusion that the government withheld substantial exculpatory evidence was a finding of fact. Pet. App. 4a. The court of appeals held that that finding was not clearly erroneous. Pet. App. 14a. This Court accords great weight to a finding of fact which has been made by a district court and affirmed by a court of appeals. *E.g., NCAA v. Bd. of Regents of Univ. of Ok.*, 468 U.S. 85, 98 n. 15 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). Petitioner does not ask this Court to set aside any factual findings of the district court; instead petitioner argues that the lower courts erred as a matter of law.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 10 1992
OFFICE OF THE CLERK

No. 90-1972

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN H. WILLIAMS, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

Cases: Page

Bank of Nova Scotia v. *United States*, 487 U.S. 250 (1988) 11
Brady v. *Maryland*, 373 U.S. 83 (1963) 5
Costello v. *United States*, 350 U.S. 359 (1956) 6
Stirone v. *United States*, 361 U.S. 212 (1960) 2, 3
United States v. *Calandra*, 414 U.S. 338 (1974) 2, 3, 6
United States v. *Dionisio*, 410 U.S. 1 (1973) 6
United States v. *R. Enterprises, Inc.*, 111 S. Ct. 722 (1991) 3, 6
United States v. *Flomenhoft*, 714 F.2d 708 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984) 8
United States v. *Gary*, No. CR90-0101-W (W.D. Okla. July 24, 1990) 8
United States v. *Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979) 7
United States v. *Isgro*, 751 F. Supp. 846 (C.D. Cal. 1990), appeal pending, No. 90-50531 (9th Cir.) 7
United States v. *Law Firm of Zimmerman & Schwartz, P.C.*, 738 F. Supp. 407 (D. Colo. 1990), aff'd *sub nom. United States* v. *Brown*, 943 F.2d 1246 (10th Cir. 1991) 8
United States v. *Lawson*, 502 F. Supp. 158 (D. Md. 1980) 7
United States v. *Mechanik*, 475 U.S. 66 (1986) 12
United States v. *Page*, 808 F.2d 723 (10th Cir.), cert. denied, 482 U.S. 918 (1987) 8, 9
Wood v. *Georgia*, 370 U.S. 375 (1962) 2

Constitution:

U.S. Const. Amend. V 1

Miscellaneous:

Administrative Office of the United States Courts, *1987 Grand and Petit Juror Service in the United States District Courts* (1987) 7
Administrative Office of the United States Courts, *1989 Grand and Petit Juror Service in the United States District Courts* (1990) 7

Miscellaneous—Continued: Page

1 ABA *Standards for Criminal Justice* (2d ed. 1980) 4
Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433 (1984) 2
G. Edwards, Jr. *The Grand Jury* (1906) 2
J. Lawless, *Prosecutorial Misconduct* (1985) 7
United States Attorneys' Manual (1990) 3

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1972

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN H. WILLIAMS, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent's proposed approach asks this Court to go far beyond enforcement of the rules promulgated to govern grand jury procedures. He asks this Court to devise a broad obligation—without roots in the common law or the Fifth Amendment—applicable to a prosecutor's evidentiary presentations before the grand jury. This alteration of grand jury practice has no foundation in any statute or Rule, yet it would be enforced by the sanction of dismissal of the indictment.

If this new affirmative duty for grand jury proceedings is to be created, it should be done by Congress or through the process for devising and amending the Rules of Criminal Procedure. The creation—outside of that process—of such an obligation with

respect to the prosecutor's presentations to the grand jury is not appropriate. See Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433, 1492-1494, 1508-1510 (1984).

1. Respondent contends (Br. 22-31) that the role of the grand jury to protect against unfounded prosecutions would be undermined without a judicially enforceable rule that prosecutors must present substantial exculpatory evidence to the grand jury. He concedes that there is no requirement that a prosecutor present merely "exculpatory" evidence, but urges a narrower rule requiring the presentation of known exculpatory evidence that directly negates guilt. That rule is necessary, he argues, in order to ensure that the grand jury is "independent and informed." Br. 25, quoting *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962).

a. Respondent's rule has no support in the history of the grand jury system. While the grand jury has the dual responsibility to determine "whether there is probable cause to believe a crime has been committed" and to protect "citizens against unfounded criminal prosecutions," *United States* v. *Calandra*, 414 U.S. 338, 343 (1974); *Stirone* v. *United States*, 361 U.S. 212, 218 n.3 (1960), it has never been the law that the grand jury is required to hear the defendant's side of the case. G. Edwards, Jr., *The Grand Jury* 140-41 (1906) (collecting authorities showing "[n]either the defendant nor any of his witnesses will be permitted to appear before the grand jury").

The requirement that the grand jury be "independent and informed" has traditionally meant that

the grand jury must have broad latitude to subpoena and consider whatever evidence it needs to determine whether a crime has been committed. See *United States* v. *R. Enterprises, Inc.*, 111 S. Ct. 722, 726 (1991) ("The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred."); *United States* v. *Calandra*, 414 U.S. at 344 ("The grand jury's investigative power must be broad if its public responsibility is adequately to be discharged."). If it is not satisfied by the evidence that the prosecutor puts before it, the grand jury has the right to ask questions, to call for additional evidence, or to reject the proposed indictment. A court, however, is not authorized to second-guess the grand jury's determination to return an indictment because the court is concerned that the grand jury did not hear enough evidence. If respondent's claim were accepted, it would seriously undermine the principle that the grand jury is a body that acts "independently of either prosecuting attorney *or judge*." *Stirone*, 361 U.S. at 218 (emphasis added); see Pet. Br. 21-22.

b. Respondent understates the costs that his rule would impose on the administration of criminal justice. The rule that respondent advances is quite different from the internal policy adopted by the Department of Justice [1] or ethical principles promul-

[1] See United States Attorneys' Manual ¶ 9-11.233, at 18 (1990) (requiring disclosure to the grand jury when the prosecutor is "personally aware" of substantial exculpatory evidence that "directly negates * * * guilt"), quoted at Pet. Br. 27-28. In the Department's view, that standard was not remotely met by the evidence on which respondent relies. That the court of appeals thought otherwise underscores the gap between the law in the Tenth Circuit and the Department's internal policy.

gated by some professional associations.[2] It is one thing to say that a particular practice is preferred; it is another to say that its omission is legal error. Moreover, respondent's rule is enforceable, not through internal or professional discipline, but through dismissal of an indictment by a district court. In evaluating the impact of respondent's proposed rule, the fact that it is administered by a court is critical.

A court cannot enforce compliance with such a duty without a detailed and burdensome inquiry into the grand jury's functions. District courts do not monitor the progress of grand jury investigations. Accordingly, when a defendant moves to dismiss his indictment on the ground that the prosecutor had in his possession but did not present "substantial" exculpatory evidence, the court generally comes to that motion cold, without any background as to the details of the offenses charged. The court must familiarize itself with the documents and witnesses the grand jury considered, and then weigh the probative value of that material against the evidence the defendant claims is substantial and exculpatory.[3] The

[2] See Resp. Br. 29; National Ass'n of Criminal Defense Lawyers Br. 22-23. For example, the American Bar Association, in a task force report setting forth ethical guidelines for prosecutors, proposed that "[n]o prosecutor should knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt." 1 ABA *Standards for Criminal Justice*, ch. 3—The Prosecution Function § 3-3.6(b) at 3.49 (2d ed. 1980). The ABA's standards, however, were "not intended as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction" but "as a guide to honorable professional conduct and performance." § 3-1.1(e) at 3.6.

[3] Here, for example, the court had to review a five-volume transcript of a deposition that respondent gave in his bankruptcy proceeding; unedited transcripts of four grand jury witnesses; and material that the government furnished to

court also must inquire whether the prosecutor knew of the withheld evidence and understood its asserted exculpatory value. There will frequently be disputes about the significance of the withheld evidence and whether its substance was presented to the grand jury through other witnesses.[4] And, assuming the evidence is actually helpful to the defendant and is not found in the grand jury record, the ultimate judgment a court must make is whether, in light of all of the facts, the withheld evidence is "substantial" to the point of negating guilt, as opposed to "merely" exculpatory.

In short, the court would have to conduct a minitrial on the defendant's guilt of the crimes charged and the prosecutor's culpability for failing to present exculpatory material to the grand jury. Yet, this Court has recognized that "[a]ny holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and

respondent in compliance with *Brady* v. *Maryland*, 373 U.S. 83 (1963), including portions of interview statements of 13 witnesses. Pet. App. 16a-17a. Respondent also relied heavily on the theory that his general ledgers, tax returns, and other financial statements were improperly omitted from the grand jury presentation, Resp. C.A. Br. 16-21; presumably the court was expected to review those as well.

[4] In this case, it was a major point of contention whether the grand jury heard the substance of respondent's defense. For example, respondent claimed that the grand jury should have heard about the procedures that his accountants, the Horter Company, used in preparing his financial statements. Resp. Br. 12-13. The government replied that the grand jury did hear testimony from both a current and former Horter accountant, and those witnesses described in detail the methods and sources used in preparing respondent's statements. Gov't C.A. Br. 17-19.

expeditious administration of the criminal laws." *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973); *Costello* v. *United States*, 350 U.S. 359, 363 (1956) (rejecting procedures that would require "before trial on the merits * * * a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury"); *Calandra*, 414 U.S. at 350 (rejecting rule that would transform grand jury proceedings "into preliminary trials on the merits" because the delay "might be fatal to the enforcement of criminal law."); *R. Enterprises, Inc.*, 111 S. Ct. at 727 (same).[5]

Respondent contends (Br. 28) that experience in the federal system demonstrates that the court of appeals' rule would not be burdensome. In fact, however, if the court of appeals' rule were applied in federal courts throughout the country, its costs would be substantial. Defendants would have a huge incentive to attack the prosecutor's conduct before the grand jury if such motions could result in dismissal of the indictment or, at minimum, discovery or disruption of the prosecution's case. Adoption of the court of appeals' rule would predictably fuel widespread litigation over the adequacy of the prosecutor's evidentiary submissions.[6] Yet, experience shows that

[5] The motion in this case is unlike motions for judgment of acquittal, appellate challenges to the sufficiency of the evidence, or post-trial motions alleging nondisclosure of exculpatory evidence. Those determinations are made *after* a full trial and development of the facts, unlike the determination made here *before* trial.

[6] One author recommended, even before the Tenth Circuit adopted its rule, that defense "[c]ounsel * * * should never hesitate to bring the government's failure to present exculpatory evidence to the court's attention. The court may conclude that the evidence omitted was substantial and may have

all but a handful of such claims will be found meritless. Respondent and his amicus have cited fewer than ten cases that supposedly involve a dismissal because of the prosecutor's failure to present substantial exculpatory evidence. Yet from 1980 through 1989, the federal system convened 7,529 grand juries for a total of 110,106 sessions. These grand juries returned 209,587 indictments against 336,796 defendants.[7] Even assuming that the cases cited by respondent turned on the omission of significant exculpatory evidence,[8] they make up a negligible fraction of the indictments returned in the federal system.[9]

led the jurors not to indict, and therefore grant your motion." J. Lawless, *Prosecutorial Misconduct* § 2.09, at 47-48 (1985).

[7] Administrative Office of the United States Courts, *1987 Grand and Petit Juror Service in the United States District Courts* 1 (1987); Administrative Office of the United States Courts, *1989 Grand and Petit Juror Service in the United States District Courts* 1 (1990).

[8] Typically, those cases involve far more. For example, in *United States* v. *Lawson*, 502 F. Supp. 158, 162-163 (D. Md. 1980), the prosecutor repeatedly asked misleading questions of a witness, contrary to the evidence, in order "to create a false impression on the grand jury." In *United States* v. *Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979), the failure to present exculpatory evidence was but one of a lengthy list of alleged misconduct, such as prosecutorial conflicts of interest and grand jury testimony by the prosecutor, that led to dismissal. In *United States* v. *Isgro*, 751 F. Supp. 846, 852 (C.D. Cal. 1990), appeal pending, No. 90-50531 (9th Cir.), the dismissal was based in the alternative on the court's view that the prosecutor had made false statements to the defendants and to the court denying the existence of exculpatory material, which the court characterized as "outrageous governmental misconduct."

[9] Another cost of respondent's proposed rule would be reflected in the protracted grand jury proceedings that would result from efforts by prosecutors to head off challenges based

Against that background, the benefits, if any, that would result from respondent's rule are far too remote and speculative to justify the burdens it would impose.

2. Respondent argues (Resp. Br. 31-43) that this case is unique among the reported appellate decisions addressing the question whether the prosecutor erred in failing to present exculpatory evidence to the grand jury; this case, respondent urges, involved the failure to disclose "substantial exculpatory evidence," while the other cases involved evidence that was merely "exculpatory." In fact, this case well illustrates the difficulty courts would have in applying respondent's "substantial exculpatory evidence" test to particular grand jury records.

The court of appeals repeatedly blurred the line that respondent attempts to draw. Although relying on the statement in *United States* v. *Page*, 808 F.2d 723, 728 (10th Cir.), cert. denied, 482 U.S. 918 (1987), that "a prosecutor has the duty to present substantial exculpatory evidence to the grand jury," the court went on to adopt the far more rigorous re-

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on the failure to present exculpatory evidence. See, *e.g.*, *United States* v. *Law Firm of Zimmerman & Schwartz, P.C.*, 738 F. Supp. 407 (D. Colo. 1990) (prosecutor felt compelled to inquire whether defense counsel wished to have evidence submitted to the grand jury, and presented that evidence in order to avoid a motion for dismissal), aff'd *sub nom. United States* v. *Brown*, 943 F.2d 1246, 1257 (10th Cir. 1991); *United States* v. *Flomenhoft*, 714 F.2d 708, 711 (7th Cir. 1983) (defendant requested prosecutor to call 10 defense witnesses before the grand jury), cert. denied, 465 U.S. 1068 (1984); cf. *United States* v. *Gary*, No. CR90-0101-W (W.D. Okla. July 24, 1990) (court dismissed indictment because prosecutor did not present to the grand jury the testimony of "strawbuyers" in housing fraud scheme who would have said that they believed the transactions were lawful).

quirement that "the grand jury must receive *any* information that is relevant to *any* reasonable theory it may adopt." It held that the prosecutor should have disclosed the evidence omitted from the grand jury record in this case because it was "*consistent* with the possible theory that defendant simply did not intend to mislead the banks." Pet. App. 5a, 8a, 11a (emphasis added).[10] If these statements are consistent with the standard articulated in *Page*, that that standard is an extraordinarily broad one.

The facts of this case undermine respondent's submission that courts can easily apply a "substantial exculpatory evidence" test. This case involves charges of bank fraud. The indictment alleges that respondent obtained various loans through the use of financial statements that overstate his "current assets" and the "interest" he earned; both misstatements relate to investments that respondent made in venture capital companies. The government's theory is that the statements created a false impression of respondent's wealth by listing notes from those companies as "current assets" (J.A. 14, 24, 34), when respondent knew that, based on the negative net worth and riskiness of those companies, the notes would not be paid within one year—the common understanding of the term "current asset." The statements also created a false impression of respondent's earnings by indicating that the venture companies were a source of interest income for respondent (J.A. 44-46), while not disclosing that that "income" consisted simply of

---

[10] Respondent's articulation of the rule manifests the same degree of breadth. While insisting that the rule applies only to substantial evidence "negating guilt," Resp. Br. 42, he also asserts that "[t]he grand jury must be apprised of all relevant evidence * * * so that its judgment may be truly informed." *Id.* at 27.

funds that respondent lent to the companies specifically so that they could return it to him as "interest." Gov't C.A. Br. 6-9.

Respondent argues that the grand jury was deprived of evidence in the government's possession that tended to show he had no intent to defraud, such as financial statements and general ledgers prepared by his accountants consistently reporting the notes receivable at their face value. Respondent also points to his bankruptcy deposition in which he stated that some venture capital investments pan out despite negative financial results in their early years, and that one investment he made in such a company did eventually succeed. See Resp. Br. 9-12.[11] In our view, the district court was correct in its initial denial of respondent's motion to dismiss. The court concluded that respondent had identified "individual items of potentially exculpatory evidence," but had not established "substantial exclusion of exculpatory evidence from the purview of the Grand Jury." Pet. App. 17a. Respondent's evidence does not "negate" guilt; it merely reflects a defense explanation that the petit jury could either accept or reject in determining whether respondent had the requisite intent to defraud.[12] In making that defense, respondent's personal credibility would be vital; yet it cannot be assessed by reading a deposition transcript. The grand jury was no more required to hear that evidence than it was required to invite respondent and his supporting cast of witnesses to testify.

[11] Respondent states (Br. 21) that the government in this case obtained the omitted evidence through its own investigation, not from defense counsel. It is hard to see the relevance of that observation. Under respondent's theory, the prosecutor has a disclosure duty when he knows of the evidence; it would not matter whether he learned of the evidence through his own investigation or through defense counsel's efforts.

[12] For example, evidence that respondent and his accountants consistently reflected his notes receivable at face value on internal records does not "negate" the fact that it was misleading to portray those notes as current assets *to the banks* without revealing the poor financial history and negative net worth of the companies. Similarly, evidence that respondent paid taxes on the interest he received (Resp. Br. 13) does not detract from the fact that it was misleading to tell the banks that those payments represented "interest income" without revealing that the money actually came from respondent's pocket and did not represent a independent source of funds.

The dispute about this evidence is typical of those that would be likely to arise under the court of appeals' rule. The articulation of the "substantial exculpatory evidence" standard and its application to particular facts would force the court into gray factual areas, in which it would frequently be debatable whether the evidence is exculpatory to any significant degree, and whether the grand jury heard its substantial equivalent. There is no reason to believe that any formulation of the rule could avoid the need for detailed factual inquiries by the court into all of the evidence that tends to prove or disprove the defendant's guilt.

3. Finally, respondent claims (Br. 43-49) that under our aanlysis of the proper relationship between the court and the grand jury, this Court's definition of the standard of prejudice required to dismiss an indictment for prosecutorial misconduct would be rendered "meaningless." See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988). As respondent admits (Br. 46), *Bank of Nova Scotia* "did not involve a prosecutor's decision to withhold substan-

tial exculpatory evidence from the grand jury"; it simply defined the degree of prejudice necessary to justify dismissal of the indictment once misconduct is found. This case involves the distinct issue of whether it is legal error in the first place when a prosecutor elects not to present exculpatory evidence to the grand jury.

Violations of statutes or rules governing the grand jury's functions may in some instances constitute misconduct, as may particularly serious examples of prosecutorial overreaching designed to deceive the grand jury. Pet. Br. 16 n.4, 22 n.8. The primary vehicle for defining such violations, however, is through amendments to the Federal Rules of Criminal Procedure. Prosecutors are "bound by a few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions." *United States* v. *Mechanik*, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring). The rule that respondent advocates is not among them.

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

KENNETH W. STARR
Solicitor General

JANUARY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45249

EDITOR'S NOTE

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No. 90-1972

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OF THE
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OCTOBER TERM 1991

UNITED STATES OF AMERICA,
Petitioner,
VS.
JOHN H. WILLIAMS, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ON THE MERITS IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I.	
ADOPTION OF PETITIONER'S ARGUMENT WOULD FUNDAMENTALLY IMPAIR THE STRUCTURAL PROTECTIONS OF OUR GRAND JURY SYSTEM	4
II.	
THE COURT OF APPEALS' STRAIGHTFORWARD APPLICATION OF ITS SUPERVISORY POWERS AND OF THIS COURT'S DECISION IN *BANK OF NOVA SCOTIA* SHOULD BE UPHELD	6
A. The Duty to Present Substantial Exculpatory Evidence that Clearly Negates Guilt Fairly Protects the Interests of the Grand Jury, the Prosecution and the Court	6
1. Historic Role of the Grand Jury	6
2. Role of the Prosecutor	9
3. The Court's Supervisory Powers	11
B. This Court's Decision in *Bank of Nova Scotia*	12
C. The Requirement that Prosecutors Present Substantial Exculpatory Evidence that Clearly Negates the Target's Guilt is Consistent with this Court's Prior Exercise of Supervisory Powers	14
1. Development of the Standard	14

TABLE OF CONTENTS

	Page
2. The Standard Appropriately Applies the Court's Supervisory Authority	16
III.	
THE REQUIREMENT THAT A PROSECUTOR PRESENT SUBSTANTIALLY EXCULPATORY EVIDENCE THAT CLEARLY NEGATES A TARGET'S GUILT IMPOSES NO SIGNIFICANT BURDEN AND REASONABLY BALANCES COMPETING INTERESTS	19
A. Petitioner Fails To Demonstrate Any Significant Burden	19
1. Claimed impact on judicial resources ..	19
2. Claimed difficulty in following or applying the standard	21
3. The Claim That Prosecutors Already Have Sufficient Incentive Not To Indict When A Conviction Is Remote	23
4. Impact of this obligation on white collar prosecution	24
5. The claim that administrative remedies provide a sufficient safeguard against grand jury abuse	27
B. The Penalties And Injuries Attendant To An Indictment Justify Any Additional Burden	27
IV.	
THE COURT SHOULD AFFIRM DISMISSAL OF RESPONDENT'S INDICTMENT.....	28
CONCLUSION	30

TABLE OF AUTHORITIES

Cases

	Page
Ballard v. United States, 329 U.S. 187 (1946)	11, 12
Bank of Nova Scotia v. United States, 487 U.S. 250 (1988)	*passim*
Berger v. United States, 295 U.S. 78 (1935)	9
Blair v. United States, 250 U.S. 273 (1919).....	8
Brady v. Maryland, 373 U.S. 83 (1963)	18, 21
Branzburg v. Hayes, 408 U.S. 665 (1972)	8
Buzbee v. Donnelly, 96 N.M. 692, 634 P.2d 1244 (1981)	20
Commonwealth v. Mayfield, 398 Mass. 615, 500 N.E.2d 774 (1986)	20
Costello v. United States, 350 U.S. 359 (1956).....	7, 10
County of Riverside v. McLaughlin, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991)	27, 28
Doe v. DiGenova, 779 F.2d 74 (D.C. Cir. 1985) ...	8
Ex parte Bain, 121 U.S. 1 (1887)	7
FDIC v. Mallen, 486 U.S. 230 (1988).....	28
Frink v. State, 597 P.2d 154 (Ala. 1979).....	20
Hale v. Henkel, 201 U.S. 43 (1906)	6
Hochman v. Rafferty, 831 F.2d 1199 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988)	15
Hoffman v. United States, 341 U.S. 479 (1951)	6
In re American Continental Corporation/Lincoln Savings and Loan Securities Litigation, U.S. Dist. Ct., D.Az., MDL Docket No. 834	26

TABLE OF AUTHORITIES

CASES

	Page
In re Consolidated Columbia Savings and Loan Actions, U.S. Dist. Ct., C.D. Cal., Master File No. CV 89-6538 SVW (Ex)	26
In re Grand Jury Subpoena Duces Tecum Dated April 19, 1991, 945 F.2d 1221 (2d Cir. 1991)	26
In re Grand Jury Subpoena Duces Tecum, 836 F.2d 1468 (4th Cir.), *cert. denied*, 487 U.S. 1240 (1988)	26
Johnson v. Superior Court, 15 Cal.3d 248, 124 Cal.Rptr. 32, 539 P.2d 792 (1975)	20
Klopfer v. North Carolina, 386 U.S. 213 (1967)	27
Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991)	25
Marshall v. United States, 360 U.S. 310 (1959)	11
Martindell v. International Tel. & Tel. Corp., 594 F.2d 291 (2d Cir. 1979)	26
McCarthy v. United States, 394 U.S. 459 (1969)	12
McNabb v. United States, 318 U.S. 332 (1943)	11
Mesarosh v. United States, 352 U.S. 1 (1956)	11
Miles v. United States, 483 A.2d 649 (D.C. 1984)	20
Napue v. Illinois, 360 U.S. 264 (1959)	18
Nelson v. State, 628 P.2d 884 (Ala. 1981)	20
Ostman v. Eighth Judicial District Court, 816 P.2d 458 (Nev. 1991)	20
People v. Abbatiello, 129 Misc.2d 831, 494 N.Y.S.2d 625 (N.Y. Sup. Ct. 1985)	20
People v. Scott, 150 Misc.2d 297, 568 N.Y.S.2d 857 (N.Y. Sup. Ct. 1991)	20

TABLE OF AUTHORITIES

CASES

	Page
State v. Adams, 64 Haw. 568, 645 P.2d 308 (1982)	20
State v. Bell, 60 Haw. 241, 589 P.2d 517 (1978)	20
State v. Coconino County Superior Court, Div. II, 139 Ariz. 422, 678 P.2d 1386 (1984)	20
State v. Couture, 194 Conn. 530, 482 A.2d 300 (1984), *cert. denied*, 469 U.S. 1192 (1985)	20
State v. Harwood, 45 Or. App. 931, 609 P.2d 1312 (1980)	20
State v. Moore, 438 N.W.2d 101 (1989)	20
State v. Nordquist, 309 N.W.2d 109 (N.D. 1981)	20
Stirone v. United States, 361 U.S. 212 (1960)	7
Strehl v. District Court of Salt Lake County, 558 P.2d 597 (Utah 1976)	20
United States v. Bagley, 473 U.S. 667 (1985)	21
United States v. Calandra, 414 U.S. 338 (1974)	7, 8, 23
United States v. Casamento, 887 F.2d 1141 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990)	15
United States v. Ciambrone, 601 F.2d 616 (2d Cir. 1979)	7, 14
United States v. Davis, 702 F.2d 418 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983)	26
United States v. Dionisio, 410 U.S. 1 (1973)	7
United States v. Dorfman, 532 F.Supp. 1118 (N.D. Ill. 1981)	16, 24
United States v. Flomenhoft, 714 F.2d 708 (7th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984)	15, 24
United States v. GAF Corp., 596 F.2d 10 (2d Cir. 1979)	26

TABLE OF AUTHORITIES

CASES

	Page
United States v. Gavran, 620 F.Supp. 1277 (E.D. Wis. 1985), *aff'd* 845 F.2d 1023 (7th Cir. 1988)	16
United States v. Isgro, 751 F.Supp. 846 (C.D. Cal. 1990)	5, 16
United States v. Lame, 716 F.2d 515 (8th Cir. 1983)	15
United States v. Law Firm of Zimmerman & Schwartz, P.C., 738 F.Supp. 407 (D.Col. 1990), *rev'd on other grounds sub. nom. United States v. Brown*, 943 F.2d 1246 (10th Cir. 1991)	24
United States v. Lawson, 502 F.Supp. 158 (D.Md. 1980)	17
United States v. Mandujano, 425 U.S. 564 (1976)	9
United States v. Martino, 825 F.2d 754 (3rd Cir. 1987)	8
United States v. Mechanik, 475 U.S. 66 (1986)	13
United States v. Moon, 532 F.Supp. 1360 (S.D.N.Y. 1982)	24
United States v. Page, 808 F.2d 723 (10th Cir. 1987), *cert. denied*, 482 U.S. 918 (1987)	15, 28, 29
United States v. Phillips Petroleum Co., 435 F.Supp. 610 (N.D. Okl. 1977)	5, 17, 18
United States v. Provenzano, 440 F.Supp. 561 (S.D.N.Y. 1977)	17
United States v. Reid, 911 F.2d 1456 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 990 (1991)	15, 16, 29
United States v. Roberts, 481 F.Supp. 1385 (C.D.Cal. 1980)	24

TABLE OF AUTHORITIES

CASES

	Page
United States v. Santucci, 674 F.2d 624 (7th Cir. 1982), *cert. denied*, 459 U.S. 1109 (1983)	8
United States v. Sells Engineering, Inc., 463 U.S. 418 (1983)	7, 12
United States v. Serubo, 604 F.2d 807 (3d Cir. 1979)	27
United States v. Short, 1991 U.S. Dist. LEXIS 16380 (D.D.C. 1991)	5
United States v. Udziela, 671 F.2d 995 (7th Cir.), *cert. denied*, 457 U.S. 1135 (1982)	10
Vasquez v. Hillery, 474 U.S. 254 (1986)	7, 12
White v. United States Postal Service, 768 F.2d 334 (Fed. Cir. 1985)	28
Wood v. Georgia, 370 U.S. 375 (1962)	7, 8
Young v. United States ex. rel. Vuitton et Fils S.A., 481 U.S. 787 (1987)	9, 12

Constitutional Provision

Amend. V	5, 6

Statutes

18 U.S.C.A. § 3322(a)	26
21 U.S.C.A. § 853(e) (Supp. 1991)	28
21 U.S.C.A. § 853(f) (Supp. 1991)	28
Cal. Code of Civil Procedure § 343	25
22 Okl. Stat. Ann. § 335	20

TABLE OF AUTHORITIES

Rules and Regulations

	Page
Fed. R. Civ. P. 24	26
Fed. R. Crim. P. 6	2, 10
Fed. R. Crim. P. 11	12
Fed. R. Crim. P. 29	21
12 C.F.R. § 563.180(d)	26
48 C.F.R. § 9.407-2(b) (1990)	28

Miscellaneous

	Page
ABA/BNA, *Lawyers' Manual on Professional Conduct* Model Code of Professional Responsibility, DR 1-102(A)(5)(1991)	9
American Bar Association Project on Standards for Criminal Justice — The Prosecution Function (1971)	
Section 1.1(c)	9
Section 3.6(b)	22
Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Pub. L. 101-647, § 2505, 104 Stat. 4789 (1990), codified as amended at 18 U.S.C.A. § 3293 (Supp. 1991)	25
7 Department of Justice Manual (1991)	
Section 9-11.020	9
Section 9-11.233	22
Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. 101-73, § 963, 103 Stat. 504 (1989), codified as amended at 18 U.S.C.A. § 3293 (Supp. 1991)	25

TABLE OF AUTHORITIES

MISCELLANEOUS

	Page
National District Attorneys Association, *National Prosecution Standards* (1977)	
Standard 2.3(A)	10
Standard 14.2(D)	23
Note, *Powers of Federal Grand Juries*, 4 Stan. L. Rev. 68, 70-71 (1951)	8
1 Wright, *Federal Practice and Procedure*, Criminal 2d § 101 (1991)	8

No. 90-1972

In the Supreme Court

OF THE

United States

OCTOBER TERM 1991

UNITED STATES OF AMERICA,
Petitioner,

VS.

JOHN H. WILLIAMS, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ON THE MERITS IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation with a nationwide membership of more than 5,000 lawyers and 25,000 affiliate members. NACDL was founded more than 25 years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of defense lawyers. Among NACDL's stated objectives is promotion of the proper administration of criminal justice, and consequently NACDL is concerned with the protection of individual rights and improvement of the criminal law, its practices and procedures. NACDL submits this brief because this case presents important issues concerning an individual's fundamental right to an independent and unbiased grand jury determination in the federal criminal justice system. NACDL is extremely concerned about any decision that would undermine or dilute this fundamental protection of individual liberty, as would adoption of the position asserted by petitioner in this case.

The Amicus Curiae Committee of NACDL has discussed this case and decided that the issues are of such importance to the criminal justice system that NACDL should offer its assistance to the Court. Both petitioner and respondent have consented to NACDL's participation as amicus curiae and their letters of consent have been filed with this Court.

SUMMARY OF ARGUMENT

1. The decision of the Court of Appeals reflects an unexceptional balancing of the roles of the grand jury and the prosecutor, and the court's supervisory authority to preserve the integrity and fairness of the criminal justice system. The grand jury traditionally performs dual functions. It determines whether there is probable cause and protects citizens from government overreaching. The

grand jury consists of ordinary citizens, generally acting only part-time, who are not required to have any knowledge of the intricacies or complexities of either substantive or procedural criminal law. It relies in great part upon the evidence, facts and law as related to it by the prosecutor. A prosecutor's wide latitude in evidentiary presentations made to a grand jury is not unlimited. Both Rule 6 of the Federal Rules of Criminal Procedure and a court's supervisory powers prevent prosecutors from impinging upon the grand jury's independence and from presenting the evidence in a deliberately misleading manner. This Court has made clear that, upon a showing that the misconduct substantially influenced the grand jury's decision to indict, a district court may properly invoke its supervisory power to dismiss an indictment for prosecutorial misconduct in a grand jury investigation. Such a showing may occur in instances where a prosecutor has manipulated a witness' testimony or knowingly participated in a misleading and inaccurate grand jury presentation. The standard for determining prejudice and the requirement that the prosecutor know of the misleading and inaccurate nature of the grand jury presentation, as articulated by this Court in *Bank of Nova Scotia*, parallel the requirement articulated by lower courts that prosecutors must present substantial exculpatory evidence that clearly negates the target's guilt.

The essential elements of the requirement to present exculpatory evidence have been repeated in numerous published decisions. First, a prosecutor is not required to search for exculpatory evidence, or to present all evidence that might be considered exculpatory. Second, as part of its obligation not to mislead the grand jury or to engage in other fundamentally unfair tactics, the prosecution must make available or present to the grand jury substantial exculpatory evidence that clearly negates the target's guilt. This requirement effectively safeguards the grand jury's independence and acts as a check on prosecutorial

conduct without converting the grand jury process into a second trial on the merits or burdening the trial courts.

2. Petitioner has failed to demonstrate any significant burden flowing from this requirement. Petitioner's claim of an adverse impact is neither borne out in practice or theory. First, within the last 15 years, district courts across the country and at least five circuit courts of appeals have required prosecutors to meet the standard. In addition at least 15 states similarly require a prosecutor to present such evidence to a grand jury. In fact, an internal Department of Justice policy already requires adherence to this standard. Petitioner identifies no evidence of any demonstrable, adverse impact on the functioning of the criminal justice system, despite the many years during which courts have imposed this requirement. Second, given the nationwide application of *Bank of Nova Scotia*, it is unreasonable to conclude that application of the duty to present substantial exculpatory evidence in those circuits that have not yet adopted the rule will significantly affect the volume of pre-trial motions.

Petitioner's claim that the standard will be difficult for courts to apply or for prosecutors to follow is similarly unsubstantiated. The standard articulated by the lower courts is objective, and involves legal determinations similar to those made every day by trial judges. Nor is this obligation difficult for prosecutors, who under existing Department of Justice policy already must comply with this standard.

While petitioner has failed to substantiate its claim of undue burden, the penalties and injuries attendant to an indictment are manifest. For example, the government may limit a defendant's use of his property, or seize that property pending resolution of the criminal trial. A defendant may be incarcerated pending trial, or released on conditions that restrict his ability to travel and his freedom of association. The government may suspend an indicted defendant from employment in federally regulated institutions, or suspend his ability to contract with

the government. Private employers may impose similar or harsher restrictions. Thus, the significant costs resulting from unwarranted indictments vastly exceed the incremental cost from application of the obligation to present substantial exculpatory evidence that clearly negates guilt in those circuits where it has not yet been required.

3. As the Tenth Circuit held, the trial court findings challenged by petitioner are not clearly erroneous. Accordingly, the judgment should be affirmed.

ARGUMENT

I. ADOPTION OF PETITIONER'S ARGUMENT WOULD FUNDAMENTALLY IMPAIR THE STRUCTURAL PROTECTIONS OF OUR GRAND JURY SYSTEM

The nationwide significance of the issue presented here is illustrated by the facts of a recent California case:

In August 1989, a Department of Justice Organized Crime Strike Force prosecutor summoned Dennis DiRicco to testify before a Los Angeles federal grand jury investigating allegations of payola in the record industry. As the prosecutor knew at the time, DiRicco had been tried the previous year in district court for the Northern District of California on charges involving money laundering and narcotics, had testified in his own defense, and been convicted on two counts and acquitted on eight others. Four months before that grand jury presentation the prosecutor had reviewed a transcript of DiRicco's trial testimony. That testimony reflected a complete, detailed denial of any of the wrongdoing about which DiRicco was to testify.

> "Personally handling the questioning of DiRicco, [the prosecutor] extracted a story from him that was diametrically opposed to his prior trial testimony in every important respect . . . Despite this dramatic 180 degree switch from DiRicco's former sworn trial testimony, [the prosecutor] failed to reveal any of that prior testimony to the Grand Jury . . . In

> fact, . . . the Government failed to tell the Grand Jury that DiRicco had *testified* at his trial, much less that a *transcript* had been prepared and was available." *United States v. Isgro*, 751 F.Supp. 846, 848 (C.D. Cal. 1990).

Without DiRicco's testimony, two of three defendants in *Isgro* could not have been indicted. *Id.* at 852. Yet if the argument advanced here by petitioner is accepted, prosecutors will be free to manipulate the grand jury to return an indictment through deliberate suppression of substantial exculpatory evidence that clearly negates a target's guilt. A prosecutor would be free to indict on the uncorroborated word of one witness, while simultaneously suppressing substantial exculpatory evidence — whether it be testimony of other witnesses, third party documentary evidence, or materials received from the target's counsel — that clearly negated the target's guilt. Or a prosecutor could selectively question a grand jury witness to elicit inculpatory testimony while consciously suppressing substantial exculpatory information about which he knows that witness would testify.[1] Such a result surely was not intended when the Fifth Amendment was added to our Constitution 200 years ago, nor should this Court countenance such practices. In the exercise of its supervisory authority to safeguard the independence of the grand jury and that institution's protection against overzealous prosecution, this Court should reject petitioner's argument and affirm the lower court decision at issue.

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[1] *See, e.g., United States v. Short*, 1991 U.S. Dist. LEXIS 16380 (D.D.C. 1991); *United States v. Phillips Petroleum Co.*, 435 F.Supp. 610 (N.D. Okl. 1977).

II. THE COURT OF APPEALS' STRAIGHTFORWARD APPLICATION OF ITS SUPERVISORY POWERS AND OF THIS COURT'S DECISION IN *BANK OF NOVA SCOTIA* SHOULD BE UPHELD

A. The Duty to Present Substantial Exculpatory Evidence that Clearly Negates Guilt Fairly Protects the Interests of the Grand Jury, the Prosecution and the Court

The decision of the Court of Appeals reflects an unexceptional balancing of the grand jury's role as an independent and unbiased shield between the ordinary citizen and the overzealous prosecutor, the prosecutor's duty to present matters to the grand jury in a dispassionate and disinterested fashion, and the court's own supervisory authority to preserve the integrity and fairness of the criminal justice system.

1. *Historic Role of the Grand Jury*

In the federal criminal justice system, the Fifth Amendment provides a check on prosecutorial discretion to initiate a felony prosecution. The Fifth Amendment provides that: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ." The grand jury performs dual functions. It exists both to determine whether there is probable cause and to protect citizens from government overreaching. " '[T]he most valuable function of the grand jury [has been] not only to examine into the commission of crimes, but to stand between the prosecutor and the accused.' " *Hoffman v. United States,* 341 U.S. 479, 485 (1951), quoting *Hale v. Henkel,* 201 U.S. 43, 59 (1906). The grand jury's role as a shield is indispensable to our criminal system. For "[h]istorically [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution . . . standing between the accuser and the accused . . . to determine whether a charge is founded

upon reason or was dictated by an intimidating power or by malice and personal ill will." *Wood v. Georgia,* 370 U.S. 375, 390 (1962). Serving "its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor," its "mission is to clear the innocent, no less than to bring to trial those who may be guilty." *United States v. Dionisio,* 410 U.S. 1, 16-17 (1973). *See also United States v. Calandra,* 414 U.S. 338, 343 (1974); *Costello v. United States,* 350 U.S. 359, 362 (1956); *Ex parte Bain,* 121 U.S. 1, 11 (1887).

As part of its shielding function, the grand jury may charge lesser offenses, indict on one or more counts or on capital or non-capital offenses. Indeed, " '[t]he grand jury is not bound to indict in every case where a conviction can be obtained.' " *Vasquez v. Hillery,* 474 U.S. 254, 263 (1986) (quoting *United States v. Ciambrone,* 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting)).

To perform its role within our constitutional structure, the grand jury must act independently of both prosecutor and judge and have virtually untrammeled investigatory powers. *Stirone v. United States,* 361 U.S. 212, 218 (1960) ("The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of fellow citizens acting independently of either prosecuting attorney or judge."). Yet, despite the recognized necessity of an independent grand jury, institutional limitations necessarily render the grand jury dependent upon the evidence presented and investigation conducted by the prosecution, particularly in modern times. A grand jury consists of ordinary citizens generally acting only part-time, who are not required to have any knowledge of the intricacies or complexities of either substantive or procedural criminal law. While historically possessed of great investigatory authority, the grand jury nevertheless relies in great part, if not entirely, upon the evidence, facts and law as presented by the prosecutor. *See, e.g., United States v. Sells Engineering, Inc.,* 463 U.S. 418, 430 (1983) ("Although

the grand jury may itself decide to investigate a matter or to seek certain evidence, it depends largely on the prosecutor's office to secure the evidence or witnesses it requires."); 1 Wright, *Federal Practice and Procedure,* Criminal 2d § 101 at 201-02 (1991) (same).[2] Grand jury subpoenas are issued by the United States Attorney's Office, after their issuance in blank by the Clerk of the Court. *See United States v. Martino,* 825 F.2d 754, 761 (3rd Cir. 1987); *Doe v. DiGenova,* 779 F.2d 74, 80 (D.C. Cir. 1985); *United States v. Santucci,* 674 F.2d 624, 627 (7th Cir. 1982), *cert. denied,* 459 U.S. 1109 (1983). Indeed, the grand jury does not necessarily approve or even have knowledge of a subpoena prior to its issuance. *Doe v. DiGenova,* 779 F.2d at 80.

Although these institutional limits hamper the grand jury's exercise of its independent investigatory powers, nevertheless the grand jury must be fully informed of the facts underlying suspected criminal activity if it is to perform its appointed constitutional duty. Given its role of determining the existence of possible criminal conduct and returning only "well-founded indictments," this Court has long noted that a grand jury inquiry cannot and should not be narrowly limited. *See, e.g., Branzburg v. Hayes,* 408 U.S. 665, 688 (1972); *Blair v. United States,* 250 U.S. 273, 282 (1919). Rather, a grand jury is entitled to and should investigate fully into possible criminal activity because such "thorough and extensive" investigations are in society's best interests. *Wood v. Georgia,* 370 U.S. at 392; *United States v. Calandra,* 414 U.S. at 344; *Branzburg v. Hayes,* 408 U.S. at 701. Such thorough and extensive investigations not only allow a grand jury to determine whether probable cause exists, but also permit the grand jury to serve as a shield against arbitrary

[2]In fact, some have advocated legislation which would permit the grand jury to employ special counsel and special investigators, and which would afford the grand jury a budget to pay for such services. *See* Note, *Powers of Federal Grand Juries,* 4 Stan. L. Rev. 68, 70-71 (1951).

accusations. *United States v. Mandujano,* 425 U.S. 564, 573 (1976) (plurality opinion) ("It is in keeping with the grand jury's historic function as a shield against arbitrary accusations to call before it persons suspected of criminal activity, so that the investigation can be complete.").

2. *Role of the Prosecutor*

Like the grand jury, it is the prosecutor's duty to investigate possible criminal activity in a dispassionate and disinterested manner. As this Court forcefully stated in *Berger v. United States,* 295 U.S. 78, 88 (1935):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."

Repeating those words in *Young v. United States ex. rel. Vuitton et Fils S.A.,* 481 U.S. 787, 803 (1987), this Court exercised its supervisory authority to apply the requirement of a disinterested prosecutor to district court appointment of private counsel to undertake a criminal contempt prosecution. Noting the expansive powers and wide-ranging discretion of "the citizen's primary adversary in a criminal proceeding," the Court reiterated the requirement that the prosecutor assess the propriety of criminal charges dispassionately. *Id.* at 805, 813-14.[3]

[3]This Court's holdings on a prosecutor's duties are echoed in ethical standards and guidelines of the American Bar Association, the Department of Justice and other organizations. *See, e.g.,* American Bar Association Project on Standards for Criminal Justice — The Prosecution Function, § 1.1(c) (1971) ("The duty of the prosecutor is to seek justice, not merely to convict."); ABA/BNA, *Lawyers' Manual on Professional Conduct,* Model Code of Professional Responsibility, DR 1-102(A)(5)(1991) ("A lawyer shall not: Engage in conduct that is prejudicial to the administration of justice.")

There is no dispute that prosecutors have wide latitude in evidentiary presentations made to a grand jury. *See United States v. Mechanik,* 475 U.S. 66, 74 (1986) (O'Connor, J., concurring). Thus, for example, prosecutors may present evidence to the grand jury that would be inadmissible at trial, so long as that presentation is not misleading. *See, e.g., United States v. Calandra,* 414 U.S. 338 (allowing presentation of illegally seized evidence); *Costello v. United States,* 350 U.S. 359 (allowing presentation of hearsay evidence).[4] Nonetheless, a prosecutor is not given unbridled authority; both Rule 6 of the Federal Rules of Criminal Procedure and the court's supervisory powers prevent prosecutors from impinging upon a grand jury's independence and from presenting the evidence in a deliberately misleading manner. *See, e.g., United States v. Mechanik,* 474 U.S. at 74-75 (O'Connor, J., concurring); *United States v. Udziela,* 671 F.2d 995, 998-99 (7th Cir.), *cert. denied,* 457 U.S. 1135 (1982) (collecting cases). Thus, for example, the prosecutor may not manipulate the process to insure that all witnesses testify in a consistent manner. *United States v. Mechanik,* 475 U.S. at 74 (O'Connor, J., concurring). This principle was reaffirmed by the Court in its decision in *Bank of Nova Scotia v. United States,* 487 U.S. 250 (1988), discussed below.

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7 Department of Justice Manual 9-11.020 (1991) ("In his/her dealings with the grand jury, the prosecutor must . . . insure that justice is done and that guilt shall not escape nor innocence suffer."); National District Attorneys Association, *National Prosecution Standards,* Standard 2.3(A) (1977) ("The prosecutor has the duty to seek justice and improve the law, not merely to enforce the law.").

[4]Relying upon *Costello,* petitioner argues that requiring a court to determine whether substantial exculpatory evidence clearly negating guilt has been presented to a grand jury would require an impermissible weighing of sufficiency of the evidence presented to the grand jury. Brief for United States at 14, 17. Petitioner's argument is inapposite. At issue here and in the other cases cited at Section I.C.2, below, is not sufficiency of evidence but rather the conduct of the prosecutor, and whether he may mislead the grand jury through selective presentation of the evidence.

3. *The Court's Supervisory Powers*

This Court has invoked its supervisory powers to protect the integrity of the administration of justice. In *McNabb v. United States,* 318 U.S. 332 (1943), it declared that judicial supervision of the administration of criminal justice implied a duty of establishing and maintaining civilized standards of procedure and evidence, which the Court then applied to exclude illegally obtained admissions. *Id.* at 340, 346. The Court noted "that safeguards must be provided against the dangers of the overzealous" and that these safeguards both assure protection for the innocent and ensure that convictions are achieved by fair procedures. *Id.* at 343, 344, 347.

In the decades since *McNabb,* this Court has continued to exercise its supervisory authority to insure the integrity and fairness of the criminal justice system. Thus, for example, in *Ballard v. United States,* 329 U.S. 187 (1946), the Court dismissed indictments because the systematic exclusion of women from grand and petit jury panels departed from the scheme of jury selection adopted by Congress. In *Marshall v. United States,* 360 U.S. 310 (1959), the Court dismissed an indictment because several trial jurors had been exposed to prejudicial newspaper articles about the defendant. Although each juror maintained that he would not be influenced by the articles, the Court exercised its supervisory power, finding that proper enforcement of the criminal law in the federal courts required a new trial. In *Mesarosh v. United States,* 352 U.S. 1, 14 (1956), the Court reversed a conviction in light of evidence that a government witness had given untruthful testimony, similar in nature to his trial testimony, in other proceedings.

> "This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the con-

dition should be remedied at the earliest opportunity."

On numerous other occasions, this Court has similarly invoked its supervisory power to protect the integrity of the criminal justice system.[5]

B. This Court's Decision in *Bank of Nova Scotia*

In *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), this Court made clear that a district court may properly invoke its supervisory power to dismiss an indictment for prosecutorial misconduct in a grand jury investigation, upon a showing that the misconduct substantially influenced the grand jury's decision to indict. The Court separated its earlier decisions on the standard for dismissal of grand jury indictments into two classes. One class, exemplified by the decisions in *Vasquez* and *Ballard*, included cases where "the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." *Id.* at 257. The other class of cases where dismissal of the indictment would be appropriate were those where " 'it is established that the violation substantially influenced the grand jury's decision to indict' " or where "there is 'grave doubt' that the decision to indict was free from the substantial influence

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[5] *See, e.g., Young v. U.S. ex. rel. Vuitton et Fils S.A.*, 481 U.S. at 808 ("use of this Court's supervisory authority has played a prominent role in ensuring that contempt proceedings are conducted in a manner consistent with basic notions of fairness."); *Vasquez v. Hillery*, 474 U.S. 254 (racial discrimination in the selection of grand jurors rendered grand jury proceedings fundamentally unfair); *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (invoking supervisory powers to deter threat to integrity of grand jury proceedings by disclosure of such proceedings for civil litigation); *McCarthy v. United States*, 394 U.S. 459 (1969) (exercising supervisory power to allow a defendant to plead anew when a district judge accepted a guilty plea without fully adhering to the procedure set forth in Federal Rule of Criminal Procedure 11).

of such violations." *Id.* at 256 (quoting *United States v. Mechanik*, 475 U.S. at 78 (O'Connor, J., concurring)).

In *Bank of Nova Scotia*, this Court suggested that a showing that the prosecutor had manipulated a witness' testimony, or knowingly participated in a "misleading and inaccurate" grand jury presentation could give rise to a finding of prejudice. 487 U.S. at 260-61, 262. Because no such showing was made there, the Court did not consider whether under the facts of that case such misconduct had an effect on the grand jury's decision to indict. Similarly, while the Court stated that infringement of a grand jury's independence may result in grave doubt as to a violation's effect on the grand jury's decision to indict, that issue was not presented either. *Id.* at 259.

The standard for determining prejudice and the requirement that the prosecutor know of the misleading and inaccurate nature of the grand jury presentation, as stated in *Bank of Nova Scotia*, parallel the standard for presentation of exculpatory evidence articulated by lower courts. The Tenth Circuit, as well as other courts that require that the prosecutor present exculpatory evidence to the grand jury, anticipated this Court's decision in *Bank of Nova Scotia*. In all instances, courts require that the prosecutor possess or know of the evidence in question before dismissing an indictment. And the indictment will not be dismissed unless the exculpatory evidence is so substantial that it clearly or directly negates the target's guilt — a formulation equivalent to this Court's finding of prejudice where the indictment decision was substantially influenced by the violation at issue, or where there is grave doubt that the indictment decision was free from such substantial influence.

The district court here found that the failure of the prosecution to present to the grand jury substantial exculpatory evidence in its possession rendered the grand jury's decision to indict gravely suspect. Pet. App. 23a, 26a. This finding represented a straightforward applica-

tion of the Court's supervisory power, as then recently articulated in *Bank of Nova Scotia*.

C. The Requirement that Prosecutors Present Substantial Exculpatory Evidence that Clearly Negates the Target's Guilt is Consistent with this Court's Prior Exercise of Supervisory Powers

1. *Development of the Standard*

The principles articulated by those courts that require a prosecutor to present substantial exculpatory evidence that clearly negates guilt are in accord with this Court's statements that a prosecutor may not act in a manner that infringes a grand jury's independence, and its exercise of supervisory powers to safeguard the institutional integrity of our criminal justice system. The two important principles are: First, a prosecutor does not have unbridled discretion, for such discretion would make a mockery of a prosecutor's duty of fairness and render the grand jury meaningless as a check on prosecutorial conduct. Second, the prosecution is not permitted to mislead the grand jury through selective presentation of the evidence. In *United States v. Ciambrone*, 601 F.2d 616 (2d Cir. 1979), the Second Circuit articulated the scope of a prosecutor's obligation to present exculpatory evidence to a grand jury. In *Ciambrone*, the court reiterated the duty of the grand jury to protect against unfounded or unsupported charges, while recognizing the grand jury's heavy dependence on the United States Attorney as its investigator and legal advisor. *Id.* at 622. While noting that a prosecutor was not obligated to search for evidence favorable to the defense or negating guilt, absent request by the grand jury, and that the defendant did not have a right to present his version of the facts before the grand jury, the court nonetheless declared that the prosecutor did not have unbridled discretion:

> "[T]he prosecutor's right to exercise some discretion and selectivity in the presentation of evidence to a grand jury does not entitle him to mislead it or to engage in fundamentally unfair tactics before it. The prosecutor, for instance, may not obtain an indictment on the basis of evidence known to him to be perjurious . . . or by leading it to believe that it has received eyewitness rather than hearsay testimony . . . We would add that where a prosecutor is aware of any substantial evidence negating guilt he should, in the interest of justice, make it known to the grand jury, at least where it might reasonably be expected to lead the jury not to indict." *Id.* at 623 (citations omitted).

The essential elements of this obligation to present exculpatory evidence have now been repeated in numerous published decisions by circuit courts of appeals and by district courts. First, a prosecutor is not required to search for exculpatory evidence, or to present all evidence that might be considered exculpatory. Second, as part of its obligation not to mislead the grand jury or to otherwise engage in fundamentally unfair tactics, the prosecution must make available or present to the grand jury substantial exculpatory evidence that clearly negates the target's guilt. Third, this obligation extends only to information in the possession of or otherwise known to the prosecutor. *See, e.g., United States v. Reid*, 911 F.2d 1456, 1460 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 990 (1991); *United States v. Casamento*, 887 F.2d 1141, 1183 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990); *Hochman v. Rafferty*, 831 F.2d 1199, 1204 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988); *United States v. Page*, 808 F.2d 723, 727 (10th Cir. 1987), *cert. denied*, 482 U.S. 918 (1987); *United States v. Lame*, 716 F.2d 515, 518 (8th Cir. 1983); *United States v. Flomenhoft*, 714 F.2d 708, 712 (7th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984).

The requirement that prosecutors must present substantial exculpatory evidence clearly negating a target's guilt effectively safeguards the grand jury's independence and acts as a check on prosecutorial conduct without converting the grand jury process into a second trial on

the merits, or burdening the trial courts. The standard articulated establishes a "difficult burden" on defendants. *E.g., United States v. Reid*, 911 F.2d at 1460; *United States v. Gavran*, 620 F.Supp. 1277, 1281 (E.D. Wis. 1985), *aff'd* 845 F.2d 1023 (7th Cir. 1988); *United States v. Dorfman*, 532 F.Supp. 1118, 1132 (N.D. Ill. 1981). As articulated in *United States v. Gavran*, 620 F.Supp. at 1281, quoting from *United States v. Dorfman:*

> "The desired effect of the 'clearly negates' test is to 'eliminate most of the problems involved with having to determine what might be considered exculpatory in the abstract, while still not permitting prosecutors to undermine completely the grand jury's function as a check on prosecutorial power.' "

2. *The Standard Appropriately Applies the Court's Supervisory Authority*

A sampling of published lower court decisions illustrates that dismissal of an indictment for failure to present such substantial exculpatory evidence is a proper exercise of a court's supervisory power to maintain the integrity of the criminal justice system.

In *United States v. Isgro*, 751 F.Supp. 846, summarized earlier, the district court reiterated, as this Court has many times before, that the grand jury's independence must be carefully guarded; otherwise the grand jury would become a "rubber stamp" for the wishes of the prosecutor and its indictment would be the prosecutor's decision and not that of the grand jury:

> "If the presentation to the Grand Jury is done unfairly and essential information is withheld, the Grand Jury is thus unable to make a decision based on a fair assessment of the evidence." *Id.* at 850.

Applying the prejudice standard enunciated in *Bank of Nova Scotia*, the court dismissed the indictment both on constitutional grounds and through exercise of its supervisory powers.

In *United States v. Lawson*, 502 F.Supp. 158 (D.Md. 1980), Lawson, a pharmacist, was indicted for filling fictitious prescriptions. Another pharmacist was a key witness before two successive grand juries. In his initial testimony, the pharmacist related that Lawson had attempted to verify the accuracy of the prescriptions, and in fact the witness had been present when Lawson had placed telephone calls attempting to verify the accuracy. During the interim between the witness' testimony between the first grand jury and his appearance before a different grand jury, the government subpoenaed telephone records that corroborated the witness' testimony. Nonetheless, the prosecutor failed to reveal to the second grand jury that he had obtained this corroborating evidence and, in fact, tried to discredit the witness. The court found that the presentation before the second grand jury — where substantially exculpatory telephone records were concealed and the witness was asked deliberately misleading questions calculated to create a false impression — required dismissal of the indictment. *Id.* at 172.

In *United States v. Provenzano*, 440 F.Supp. 561 (S.D.N.Y. 1977) the indictment was dependent upon the reliability of one key witness. After the initial indictment and prior to a superseding indictment, the witness recanted his testimony, informing the prosecutor of his doubts about the accuracy of his prior testimony. Nonetheless, the government presented the case to a second grand jury based solely on the transcript of the witness' testimony before the earlier grand jury, and concealed his subsequent doubts regarding the reliability of that testimony. This failure to present substantial exculpatory evidence was found to have deprived the grand jury of an opportunity to make an independent evaluation of the evidence, "misleading the grand jurors as to the 'shoddy merchandise' they were getting." *Id.* at 565.

Finally, in *United States v. Phillips Petroleum Co.*, 435 F.Supp. 610 (N.D. Okl. 1977), defendant company was charged with intentionally filing false tax returns. A key

witness before the grand jury was the employee principally responsible for handling the tax issue in question. After he had completed his first day of testimony, in a recorded interview with the prosecutor that evening, the witness attributed the failure to report the taxes properly to his own carelessness, rather than to any intentional action by the company. When the witness resumed his testimony before the grand jury the next day, the prosecutor failed to reveal this substantially exculpatory explanation, an explanation that the court found clearly tended to negate elements of the crime. *Id.* at 619, n.1. The court stated that the grand jury should have been apprised of this testimony in order to make its independent judgment, and found that it was likely the indictment would never have been returned had the exculpatory statements been disclosed. *Id.* at 619-620.

Were this Court to agree with petitioner that a prosecutor need not present substantial exculpatory evidence that clearly negates guilt, each of the foregoing illustrative cases necessarily would be incorrectly decided. Sanctioning such prosecution conduct would have drastic consequences for a grand jury's independence. By skewing the evidence, the prosecution would effectively deprive the grand jury of its ability to perform either of its functions: it could neither form an independent judgment that the evidence warrants a finding of probable cause nor exercise its powers to protect the innocent from government overreaching.

Just as failure to disclose the possible interest of a witness in testifying falsely at trial can adversely affect a defendant's life or liberty, *see Napue v. Illinois*, 360 U.S. 264, 269 (1959), so too can knowing concealment of substantially exculpatory testimony have drastic consequences for the target of a grand jury investigation. As this Court recognized in *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963):

> "A prosecution that withholds evidence . . . which, if made available, would tend to exculpate him or

> reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not compare with the standards of justice. . . ."

III. THE REQUIREMENT THAT A PROSECUTOR PRESENT SUBSTANTIALLY EXCULPATORY EVIDENCE THAT CLEARLY NEGATES A TARGET'S GUILT IMPOSES NO SIGNIFICANT BURDEN AND REASONABLY BALANCES COMPETING INTERESTS

A. Petitioner Fails To Demonstrate Any Significant Burden

Petitioner contends that the obligation to present substantial exculpatory evidence that clearly negates guilt would impose significant burden on the judicial system, vastly outweighing any marginal benefit. Petitioner claims that (1) courts would devote more time and effort in processing pretrial motions; (2) the standard is extremely difficult for prosecutors to follow or courts to apply; (3) prosecutors already have sufficient incentive not to seek an indictment where the chance of conviction is remote; (4) this obligation would significantly impact prosecution of white collar crime; and (5) any failure to present known exculpatory evidence that likely would have led the grand jury not to indict can be addressed as a violation of internal guidelines.

1. *Claimed impact on judicial resources*

This supposed burden is neither borne out in practice or theory. Within the last 15 years, district courts across the country and at least five circuit courts of appeals have required prosecutors who know of substantial exculpatory evidence that clearly negates guilt to present that evidence to a grand jury. In addition, at least 15 states, either by statute or by case law, similarly require a

prosecutor to present such evidence to a grand jury.[6] Moreover, as quoted in the next section, it is internal Department of Justice policy to apply this standard. Yet despite the many years during which courts have imposed this requirement, petitioner cannot identify evidence of any demonstrable, adverse impact on the functioning of the criminal justice system, nor any widespread expression of difficulty in interpreting this requirement.

Moreover, the Court's decision in *Bank of Nova Scotia* already recognizes that supervisory authority may be invoked in pre-trial motions to dismiss an indictment for prosecutorial misconduct in a grand jury investigation. Given the nationwide application of *Bank of Nova Scotia,* it is unreasonable to conclude that application of the duty to present substantial exculpatory evidence that clearly negates guilt in those circuits that have not yet adopted the rule will significantly affect the volume of pre-trial motions.

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[6] *See, e.g.,* Alaska: *Nelson v. State*, 628 P.2d 884, 887 (Ala. 1981); *Frink v. State*, 597 P.2d 154, 164 (Ala. 1979); Arizona: *State v. Coconino County Superior Court*, Div. II, 139 Ariz. 422, 678 P.2d 1386, 1389 (1984); California: *Johnson v. Superior Court*, 15 Cal.3d 248, 255, 124 Cal.Rptr. 32, 539 P.2d 792 (1975); Connecticut: *State v. Couture*, 194 Conn. 530, 482 A.2d 300, 315 (1984), *cert. denied*, 469 U.S. 1192 (1985); District of Columbia: *Miles v. United States*, 483 A.2d 649 (D.C. 1984); Hawaii: *State v. Adams*, 64 Haw. 568, 645 P.2d 308, 311 (1982); *State v. Bell*, 60 Haw. 241, 589 P.2d 517, 521 (1978); Massachusetts: *Commonwealth v. Mayfield*, 398 Mass. 615, 500 N.E.2d 774, 778 (1986); Minnesota: *State v. Moore*, 438 N.W.2d 101, 105 (1989); Nevada: *Ostman v. Eighth Judicial District Court*, 816 P.2d 458, 459 (Nev. 1991); New Mexico: *Buzbee v. Donnelly*, 96 N.M. 692, 634 P.2d 1244, 1251 (1981); New York: *People v. Scott*, 150 Misc.2d 297, 568 N.Y.S.2d 857 (N.Y. Sup. Ct. 1991); *People v. Abbatiello*, 129 Misc. 2d 831, 494 N.Y.S.2d 625 (N.Y. Sup. Ct. 1985); North Dakota: *State v. Nordquist*, 309 N.W.2d 109, 118 (N.D. 1981); Oklahoma: 22 Okl. Stat. Ann. § 335; Oregon: *State v. Harwood*, 45 Or. App. 931, 609 P.2d 1312, 1316-17 (1980); Utah: *Strehl v. District Court of Salt Lake County*, 558 P.2d 597, 598-99 (Utah 1976).

2. *Claimed difficulty in following or applying the standard*

The standard articulated by the lower courts is objective, and involves legal determinations similar to those made every day by trial judges. A defendant seeking to dismiss an indictment for failure to present substantial exculpatory evidence must show the following: (1) Specified evidence allegedly was not presented to the grand jury; (2) The evidence is substantial and clearly negates the defendant's guilt; and (3) The prosecutor possessed or otherwise knew of the evidence before indictment.

Application of the three requirements is straightforward. A defendant arguing that the prosecutor had knowledge of the evidence at issue would establish how and when the evidence came into the prosecutor's possession. These objective facts will generally not be in dispute. Similarly, whether the allegedly exculpatory evidence was presented to the grand jury is not difficult to determine. If it has not been presented, the prosecutor will acknowledge that fact. If it has been presented, the prosecutor can direct the court's attention to the specific evidence without compromising grand jury secrecy.

Whether the evidence is substantially exculpatory and clearly negates guilt is no different than determinations that trial and appellate courts make on a daily basis, in such decisions as motions for judgment of acquittal under Federal Rule of Criminal Procedure 29, appellate challenges to sufficiency of the evidence, or in post-trial motions alleging the failure to disclose material exculpatory evidence as required by *Brady v. Maryland. Cf. United States v. Bagley*, 473 U.S. 667 (1985).

Nor is practical application of the standard complicated. The trial judge would have before him the grand jury indictment, setting forth the alleged crimes and the manner of their commission. The trial judge can objectively determine by comparison of the indictment with the allegedly exculpatory evidence whether in fact such evidence is substantial and clearly negates an element of the

alleged crime. Again, trial and appellate courts have considered such challenges to indictments in dozens of reported decisions and presumably in hundreds of unreported instances. Application of this requirement in those courts that do not currently require presentation of such evidence will impose no significant burden.

Nor is this obligation difficult for prosecutors to apply, unless petitioner contends that prosecutors are incapable of following existing Department of Justice policy. It is already internal Department of Justice policy that:

> "when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person." 7 Department of Justice Manual 9-11.233 (1991).

This formulation is echoed by the American Bar Association in its Standards Relating to the Prosecution Function[7] and in its Grand Jury Policy and Model Act,[8] as well

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[7]American Bar Association Project on Standards for Criminal Justice — The Prosecution Function, § 3.6(b) (1971): "The prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt."

[8]ABA Grand Jury Policy and Model Act (1982). Principle 3 provides: "No prosecutor shall knowingly fail to disclose to the grand jury evidence which will tend substantially to negate guilt." Draft Statute § 101 provides:

> "Prosecutor's Duty to Disclose Exculpatory Evidence To the Grand Jury
>
> 1. If the prosecutor is aware of exculpatory evidence, that is, evidence which, if believed, tends to negate one of the material elements of the crime, he must disclose and if feasible present such evidence to the grand jury.
>
> 2. If the prosecutor is aware of exculpatory evidence which bears upon a possible affirmative defense that, if believed, raises a reasonable doubt about the defendant's guilt, he should alert the grand jury to its existence and inform them of their right to call for such evidence.

as in the National Prosecution Standards adopted by the National District Attorney's Association.[9]

3. *The Claim That Prosecutors Already Have Sufficient Incentive Not To Indict When A Conviction Is Remote*

Petitioner claims that prosecutors would not seek indictment where the chances of conviction are remote, citing *United States v. Calandra,* 414 U.S. at 351, and that this provides a sufficient check on prosecutorial conduct. Brief for the United States at 25. Of course, this statement applies with equal force to an argument that grand juries are unnecessary, for if a prosecutor would not indict where a conviction was remote, arguably a grand jury check on prosecutorial discretion would be superfluous. Yet when this country's leaders approved the Bill of Rights, they included the requirement that no felony prosecution could commence unless an indictment was presented by a grand jury. As this Court has articulated over the past 200 years, the naked claim that a prosecutor would not seek indictment in a marginal case is simply insufficient justification for granting prosecutor's unbridled discretion over grand jury presentations.

> 3. After arraignment upon an indictment, the court, upon motion of the defendant made within [30] days after the entry of a not guilty plea, may dismiss any indictment where the prosecutor knowingly failed to disclose exculpatory evidence of the type defined in section 1. The court should not dismiss an indictment because of the prosecutor's failure to disclose exculpatory evidence of the type defined in section 2 unless the court determines that such omitted exculpatory evidence was so compelling that indictment by the grand jury was not justified upon the evidence presented."

[9]National District Attorneys Association, *National Prosecution Standards* (1977). Standard 14.2(D) provides: "The prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt or preclude the finding of an indictment."

4. *Impact of this obligation on white collar prosecution*

Petitioner claims that requiring presentation of substantial exculpatory evidence that clearly negates guilt would pose particularly acute burdens in white collar criminal cases. Brief for the United States at 27. Again, this speculative harm finds no support in actual practice.

First, as illustrated by many reported decisions and as is particularly true in white collar criminal prosecutions, it is rarely a mystery what evidence a defendant believes should be presented to the grand jury. It is the rule, rather than the exception, in white collar investigations, that prosecutors and defense counsel discuss the conduct under investigation well before an indictment is returned. Defense counsel routinely asks or is invited to present facts militating against indictment. In fact, many reported decisions acknowledge the existence of such on-going communication. *See, e.g., United States v. Flomenhoft,* 714 F.2d at 710-11 (government asked defendant what information he desired be presented to grand jury; defendant identified evidence and requested that ten specific witnesses be called to testify); *United States v. Ciambrone,* 601 F.2d at 625 (defendant invited to testify before grand jury and defense counsel given opportunity to submit his views or contentions); *United States v. Law Firm of Zimmerman & Schwartz, P.C.,* 738 F.Supp. 407, 411 (D.Col. 1990), *rev'd on other grounds sub. nom. United States v. Brown,* 943 F.2d 1246 (10th Cir. 1991) (prosecutor tendered to grand jury detailed letters with supporting exhibits presented by defense counsel to explain why the evidence did not support an indictment, as well as character witness for defendant and defendant's proposed instructions on the law); *United States v. Moon,* 532 F.Supp. 1360, 1367-68 (S.D.N.Y. 1982) (defense counsel provided prosecutor with binder containing affidavits of nineteen witnesses who assertedly corroborated defense claims); *United States v. Dorfman,* 532 F.Supp. at 1130 (defense counsel provided government with copies of

polygraph examination reports); *United States v. Roberts,* 481 F.Supp. 1385, 1386-87 (C.D.Cal. 1980) (defense counsel presented specific exculpatory evidence to prosecutor and made pretrial motion for order requiring presentation of such evidence).

Second, petitioner fails to mention that many white collar prosecutions are the subject of parallel civil proceedings. With the extension of statutes of limitations for prosecution of many white collar offenses,[10] it has become increasingly more common for civil proceedings to precede criminal prosecution, and in many instances reach a conclusion before indictment.[11] Existence of such parallel proceedings has prompted prosecutors to intervene in those proceedings and to seek access to discovery materials covered by protective order.[12] Review of such plead-

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[10] *See, e.g.,* Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. 101-73, § 963, 103 Stat. 504 (1989), codified as amended at 18 U.S.C.A. § 3293 (Supp. 1991), extending the statute of limitations for crimes affecting financial institutions from five to ten years; Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Pub. L. 101-647, § 2505, 104 Stat. 4789 (1990), codified as amended at 18 U.S.C.A. § 3293 (Supp. 1991), extending FIRREA's special ten year statute of limitations to violations of the RICO statute to the extent the racketeering activity includes a violation of the bank fraud statute.

[11] Thus, for example, while a prosecutor may wait a maximum of ten years to prosecute a defendant for commission of a crime affecting a financial institution, a plaintiff alleging securities fraud against an officer of a financial institution must commence his action within the earlier of "one year after discovery of the facts constituting the violation and within three years after such violation." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 111 S.Ct. 2773, 2782, 115 L.Ed.2d 321, 336 (1991). Similarly, if the bank officer's criminal conduct forms the basis for a civil breach of fiduciary duty claim, the state statute of limitations will expire well before the deadline for criminal prosecution. *E.g.,* Cal.Code Civ. Proc. § 343 (4 years).

[12] For example, prior to completion of any criminal investigation, the United States Attorney's office intervened in civil litigation in Arizona, involving Lincoln Savings, *In re American Continental Cor-*

ings as answers and summary judgment motions and attendance at court hearings generally removes any mystery as to what evidence the defendant considers substantially exculpatory.[13] Thus, petitioner's anxiety as to white collar investigations is profoundly misplaced.[14]

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poration/Lincoln Savings and Loan Securities Litigation, U.S. Dist. Ct., D.Az., MDL Docket No. 834, and in civil litigation in California involving Columbia Savings. *In re Consolidated Columbia Savings and Loan Actions*, U.S. Dist. Ct., C.D. Cal., Master File No. CV 89-6538 SVW (Ex). Intervention is permitted by Federal Rule of Civil Procedure 24. *See Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 294 (2d Cir. 1979).

Similarly, efforts by prosecutors to gain access to civil discovery materials subject to protective orders have occasionally been successful. *See In re Grand Jury Subpoena Duces Tecum*, 836 F.2d 1468 (4th Cir.), *cert. denied*, 487 U.S. 1240 (1988); *United States v. Davis*, 702 F.2d 418 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983), *United States v. GAF Corp.*, 596 F.2d 10 (2d Cir. 1979). *But see In re Grand Jury Subpoena Duces Tecum Dated April 19, 1991*, 945 F.2d 1221 (2d Cir. 1991); *Martindell*, 594 F.2d 291.

[13]With increasing frequency, former officers of financial institutions are subject to litigation commenced both by the Federal Deposit Insurance Corporation, on behalf of the Resolution Trust Corporation, and by the Office of Thrift Supervision of the Department of Treasury. By statute, these agencies may have access to grand jury materials, *see* 18 U.S.C.A. § 3322(a), and by regulation financial institutions are required to make criminal referrals both to law enforcement and regulators. *E.g.*, 12 C.F.R. § 563.180(d). Thus in practice there is considerable coordination between regulators and prosecutors. The civil litigation referred to in the previous footnote has included claims presented by the FDIC and OTS, as well as by private plaintiffs.

[14]Amicus does not suggest that the likely defense is always known in white collar prosecutions, or that there is always an open dialogue between the prosecution and defense lawyers. However, in practice there is much greater disclosure and less mystery in these cases, contrary to the blanket statement that white collar cases present special concern.

5. *The claim that administrative remedies provide a sufficient safeguard against grand jury abuse*

Both the standard articulated by the lower courts and *Bank of Nova Scotia* require a showing of prejudicial impact on the decision to indict. Knowledge that a prosecutor may suffer some administrative consequence will do little to remedy the harm suffered by the defendant. Moreover any modest impact from application of this rule is warranted given the importance of safeguarding the independence of the grand jury.

B. The Penalties And Injuries Attendant To An Indictment Justify Any Additional Burden

Petitioner's reassurance that prosecutors would not seek indictment when the chance of conviction is remote is little solace for those whose indictments are substantially influenced by the failure to present substantial exculpatory evidence that clearly negates guilt. An indictment bears its own penalties that often will not be cured by any subsequent acquittal, however swift. "The pendency of the indictment may subject [a defendant] to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes." *Klopfer v. North Carolina*, 386 U.S. 213, 222 (1967). "[W]hile in theory a trial provides the defendant with a full opportunity to contest and disprove the charges against him, in practice the handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo." *United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979).[15]

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[15]Moreover, at the time of the grand jury presentation, there has not yet been any determination of probable cause. This Court recently reiterated the consequences for an individual detained without an impartial determination of probable cause:

> "prolonged detention based on incorrect or unfounded suspicion may unjustly 'imperil a suspect's job, interrupt his source of income, and impair his family relationships.'" *County of River-*

Upon issuance of an indictment, the government may limit a defendant's use of his property or seize property pending resolution of the criminal trial. *See, e.g.*, 21 U.S.C.A. §§ 853(e) and (f) (Supp. 1991). A defendant may be incarcerated pending trial or released on conditions that restrict his ability to travel and his freedom of association. The government may suspend an indicted defendant from employment in federally regulated institutions, *see, e.g., FDIC v. Mallen*, 486 U.S. 230 (1988), or suspend his ability to contract with the government. *See, e.g.*, 48 C.F.R. 9.407-2(b) (1990). The government may suspend its own employees pending the outcome of the criminal trial. *See, e.g., White v. United States Postal Service*, 768 F.2d 334 (Fed. Cir. 1985). And, of course, private employers may impose similar or harsher restrictions.

Simply put, acquittal does not expunge the memory or eradicate any imprint of an indictment. The significant individual, judicial and societal costs resulting from unwarranted indictments vastly exceed any incremental cost from application of this obligation in those circuits where it has not yet been required.

IV. THE COURT SHOULD AFFIRM DISMISSAL OF RESPONDENT'S INDICTMENT

For the foregoing reasons, this Court should uphold the Tenth Circuit requirement that prosecutors present to the grand jury substantial exculpatory evidence that clearly negates the target's guilt, as first articulated in *United States v. Page*, 808 F.2d at 727-28. Petitioner flyspecks the Tenth Circuit opinion in this case to create a false issue, namely a claim that use of such words as "consistent with the possible theory" or "relevant to any reasonable theory" suggests application of a different standard in the present case than was applied in *Page*. Brief for the United States at 29. When properly considered in context,

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side v. McLaughlin, 111 S.Ct. 1661, 1668, 114 L.Ed.2d 49, 60 (1991) (citation omitted).

it is clear that the Tenth Circuit did not deviate in this case from its decision in *Page*. This is confirmed by subsequent Tenth Circuit citation to this case and articulation of the standard enunciated in *Page*. *See United States v. Reid*, 911 F.2d at 1460.

The trial court found that specific evidence known to the government — general ledgers and tax records obtained from respondent's accounting firm and written materials including the five volume deposition of respondent generated in bankruptcy proceedings — contained substantial exculpatory information and should have been presented to the grand jury. On appeal, the Tenth Circuit was bound by these factual findings unless clearly erroneous. Because the withheld evidence was consistent with reasonable defense theories, the Tenth Circuit correctly determined that the district court's findings were not clearly erroneous. For the reasons expressed in respondent's brief on the merits, amicus NACDL agrees that the district court findings are not clearly erroneous and thus this Court should affirm.

CONCLUSION

Requiring prosecutors to present substantial exculpatory evidence that clearly negates guilt provides an important safeguard against erosion of the grand jury's independence. If petitioner's argument is adopted, a prosecutor in his unbridled discretion can manipulate his grand jury presentation to convey a false and inaccurate portrait of the events the grand jury is charged to consider in independent and impartial fashion. If the grand jury as an institution is to serve its function as a shield against the whims of the overzealous prosecutor, petitioner's argument must be rejected. The judgment of the Court of Appeals should be affirmed.

December 1991 Respectfully submitted,

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